82-94

Office - Supreme Court, U.S.
FILED
[illegible] 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. WARREN MANGAN

O'Connor & Mangan, P.C.
29-27 41st Avenue
Long Island City, N.Y.
11101
(212) 361-7950

Counsel for Petitioner

(12545)

QUESTIONS PRESENTED

1. Whether, absent proof that protected concerted activities were a motivating factor in an employer's discharge of its employees, the union can, nevertheless, be found to have caused their discharge.

2. Does the doctrine of respondeat superior impose liability on a union for the conduct of its shop steward while performing duties for which he was totally responsible to his employer.

3. Does due process prevent the finding of an unfair labor practice without a hearing on the merits as required by the Administrative Procedure Act and the National Labor Relations Board's Rules and Regulations.

TABLE OF CONTENTS

	PAGE
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	v
Orders Below.....	1
Jurisdiction.....	2
Statutory Provisions Involved.	3
Statement of the Case.....	3
The Board's Conclusions of Law and Order.....	5
The Decision of the Court of Appeals.....	7
Reasons for Granting the Writ.	8
1. The Decision Below Conflicts With The Principles Enunciated By This Court in Mt. Healthy City School Board of Education v. Doyle.....	8
2. The Decision Below Rests On An Erroneous Legal Foundation and Must Be Set Aside.....	13

PAGE

3. The Union Didn't Receive The Due Process Required By the Administrative Procedure Act and the Board's Rules and Regulations..... 18

Conclusion..... 21

Appendix A

Order of the Court of Appeals..... 1a

Decision of the ALJ..... 7a

Decision and Order of the National Labor Relations Board..... 204a

Order Consolidating Cases, Complaint and Notice of Hearing (dated December 30,1977)..... 250a

Complaint and Notice of Hearing (dated April 19, 1978)..... 267a

Termination Letter..... 275a

APPENDIX B

National Labor Relations Act, 29 U.S.C. Sections 158(a)(1)(2)(3), 158(b)(1)(A), (2), (3) and 160(f)..... 1b

Administrative Procedure Act, 5 U.S.C. Section 554..... 8b

PAGE

National Labor Relations Board's Rules and Regulations, Section 102.15..... 13b

TABLE OF AUTHORITIES

Cases PAGE

Carbon Fuel v. Mine Workers, 444 U.S. 212, 217 (1979).....14

Coronado Coal Co. v. Mine Workers, 268 U.S. 295, 304 (1925).....14,15

General Building Contractors Association v. Pennsylvania, et al, ___U.S.___, decided June 29, 1982....17

Mt. Healthy City School District Board of Education v. Doyle 429 U.S. 274 (1977).....8,10,11,12,13

NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 184-185.....14

NLRB v. Eldorado Mfg. Corp., 660 F. 2d 1207 (7th Cir. 1981).....8,12

NLRB v. Local 3, IBEW 467 F. 2d 1158, 1160 (2d Cir. 1972).....17,18

NLRB v. Wright Line 662 F. 2d 899 (1st Cir. 1981), cert. denied ___U.S.___(1982)..7

Radio Officers v. NLRB 347 U.S. 17 (1954).....8

PAGE

Scofield v. NLRB
394 U.S. 423,
428-429.....14

SEC v. Chenery Corp.
318 U.S. 157, 182
(1971).....19

Sheet Metal Workers
v. NLRB, 293 F. 2d
141, 149.....18

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Local 282, I.B.T., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit enforcing an order of the National Labor Relations Board.

ORDERS BELOW

The order of the Court of Appeals

(App. A at 1a)[1] has not been reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (App. A at 204-237) are reported at 251 NLRB 219 (1980).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit, enforcing the Board's order was entered on April 14, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

---

[1] "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the order of the Court below, the decision and order of the National Labor Relations Board and the Administrative Law Judge, the Order consolidating Cases, Complaint and Notice of Hearing (dated December 30, 1977), and Complaint and Notice of Hearing (dated April 19, 1978). Appendix B contains the statutory and regulation references.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(b)(1)(A) and 8(b)(2). They are set forth in Appendix B.

STATEMENT OF THE CASE

Willets Point Contracting Corp. ("Willets") is engaged in the asphalt supply and paving business in New York City, New York. The Willets' truck drivers, as well as those employed by others engaged in the asphalt and paving industry within the City of New York, were covered by the terms and conditions set forth in the 1975-1978 Ready-Mix, Sand, Gravel, Asphalt and Bulk Cement Contract ("Agreement") [A. 1477-1479],[2]

---

2 "A." refers to the Appendix in the Court of Appeals.

negotiated by the General Contractors Association ("GCA") and Local 282, I.B.T. ("Union").

The historical method for assigning Willets' drivers to available work is by seniority among those persons that report timely. This is the industry's "shape system". Drivers are required to shape daily in order to preserve their seniority.

Because of a reduction in employment opportunity all of the Willets' drivers, in September 1974, agreed, among themselves, to alter the shape system at Willets to one day per week. No official of the Union, the GCA or Willets participated in this arrangement (A. 1071).

On October 21, 1977, Willets addressed termination letters to five (5) drivers, including Charles Curd and John Kuebler. The letters pointed out that the five (5) drivers were not

shaping daily to make themselves available for work [App. A at 275]. Kuebler and Curd filed unfair labor practice charges against Willets alleging a violation of Section 8(a)(3). They, thereafter, also filed Section 8(b)(1)(A) and (2) charges against the Union. The charges against Willets were dismissed by the Board's Regional Director and a complaint was issued against the Union. Each charge filed by Kuebler and Curd alleged that the discharge was because of engaging in concerted protected activity.

The Board's Conclusions of Law and Order

The Board, adopting the conclusions of law of the Administrative Law Judge ("ALJ"), found that the Union violated Sections 8(b)(1)(A) and 8(b)(2) by causing Willets to discharge Kuebler and Curd. The Board further accepted the ALJ's findings that Willets delegated to Robert Worhacz, the drivers' shop steward, "total responsibility for the

maintenance of [its] shape records" and that Worhacz utilized that authority to devise and implement a discriminatory scheme to cause the discharge of Kuebler and Curd through the falsification of those records [App. A at 69, 107-108].[3] The Board's order directs the Union to compensate Kuebler and Curd for all days they would have worked for Willets between October 21, 1977 and the date of their reinstatement or until such time as they have found substantially equivalent positions elsewhere if Willets refuses to reinstate them [App. A. at 232-233].

---

[3] The Board found that Kuebler and Curd had shaped one day each week and that Worhacz had not reflected this in the Willets' shape records. The stated cause for their discharge was that they didn't shape the job, daily, to make themselves available for work. It is speculative to infer that Willets' decision would have been different had its shape records supported Kuebler and Curd's claim that they shaped the job one day each week.

The Decision of the Court of Appeals

The Court of Appeals acting upon the petition of the Board, pursuant to Section 10(f) of the Act, granted enforcement of the Board's order by an informal opinion [App. A at 1a]. The court found "the record sufficient to support the Board's finding that Worhacz was acting as the agent of the Union." The court further observed that it need not determine whether the Board's Wright Line[4] test for determining causation for these discharges was applicable because the "Union's essential position was denial of a wrongful motivation, not that a wrongful motivation played only a minor part in an otherwise justified action."

---

4 NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981), cert. denied __U.S. ___ 1982).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THIS COURT IN MT. HEALTHY CITY SCHOOL BOARD OF EDUCATION V. DOYLE

The General Counsel has not satisifed its burden of proof to show that Willets' discharge of Kuebler and Curd was caused or was attempted to be caused by the Union. NLRB v. Eldorado Mfg. Corp. 660 F. 2d 1207 [7th Cir. 1981].

A violation of Section 8(b)(2) can be found without joining the employer as a co-respondent and finding a Section 8(a)(3) violation. Radio Officers v. NLRB, 347 U.S. 17 (1954). The essential feature of a Section 8(b)(2) violation is the relationship between cause and effect. There must be an affirmative showing of collusion between the labor organization and the employer to cause or attempt to cause the unlawful discharge.

Here, however, charges were filed by Kuebler and Curd against Willets and dismissed on the very day that the complaint was issued against the Union. Under the circumstances herein the failure to join Willets as a co-respondent constituted a breach of discretion when considered in conjunction with the Board's finding, without any allegation in the complaint, that the Union caused Kuebler and Curd's discharge. [App. A at 250-274].

The intent of this Court and Congress has been to give the Board power to both find and remedy unfair labor practices based upon comparable standards for both employers and unions. The record proof, herein, would have resulted in the dismissal of a Section 8(a)(3) complaint against Willets under the Board's Wright Line adaptation of this

Court's Mt. Healthy test.[5] The Wright Line test requires the General Counsel to show that protected activities were a "motivating factor" in the decision to terminate an employee, and to prove the Section 8(a) (3) violation by a preponderance of the evidence.

There is no record evidence that protected activities of Kuebler and Curd were a "motivating factor" in Willets' decision to terminate them. Had the General Counsel carried that burden the ALJ and the Board could then have gone on to determine whether the General Counsel had shown by a preponderance of the evidence that Willets would not have terminated Kuebler and Curd "but for" the falsification of their shape

---

5 Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

records. This Court's Mt. Healthy test is not satisfied by an inference that Willets was erroneously led to believe that Kuebler and Curd did not observe their obligation under the shape system.

The decision below required the Union to request the reinstatement of Kuebler and Curd by Willets; to suffer the back pay consequences of Willets' discharges of Kuebler and Curd and Willets refusal to reinstate them.[6] The Board issued this remedial order without any record evidence of whether Willets: (1) was motivated to terminate Kuebler and Curd because of their protected activities, and (2) would have reached the same termination decision had the falsification of Kuebler and Curd's shape records not occurred.

---

[6] Willets has refused the Union's request to reinstate Kuebler and Curd.

The Mt. Healthy test is a rule of causation which focuses upon placing a terminated employee in no better position by engaging in protected activity than that person would have otherwise occupied. The decision below would have the Union bear the burden of proving a negative, to wit., that Willets' discharges were not caused by any falsification of the shape records, without General Counsel coming forward with any proof that protected activities were a "motivating factor" in Willets' decision to terminate Kuebler and Curd. Such a burden on the Union is practically impossible and legally obnoxious. In so doing the Board has done violence to the principles enunciated by this Court in its Mt. Healthy decision.

The issue presented herein was confronted and decided by the Seventh Circuit in NLRB v. Eldorado Mfg., Corp.,

supra. That court applied the Mt. Healthy test and found that "even assuming that the union requested the discharges there was no violation of Sections 8(b)(2) and (1)(A)."

2. THE DECISION BELOW RESTS ON AN ERRONEOUS LEGAL FOUNDATION AND MUST BE SET ASIDE.

The Board's Decision and Order found that Willets, alone, delegated to Worchaz "total responsibility for the maintenance of [its] shape records." Worchaz was to have utilized that authority to devise and implement a discriminatory scheme to discharge Kuebler and Curd. The unfair labor practices attributed to the Union are pursuant to the common-law doctrine of respondeat superior that Congress has applied to labor organizations. To hold a union responsible for the acts of a shop steward it must be clearly shown that the steward was acting pursuant to a

settled union policy. Coronado Coal Co. v. Mine Workers, 268 U.S. 295, 304 [1925]. Moreover, there must be substantial evidence that the Union instigated, supported, ratified or encouraged the activity in question. Carbon Fuel Co. v. Mine Workers, 444 U.S. 212, 217 (1979).

Sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2) form a web, of which 8(b)(1)(A) is only a strand. It prevents a union from inducing an employer to use the emoluments of the job to enforce the union's rules. Scofield v. NLRB, 394 U.S. 423, 428-429; NLRB v. Allis Chalmers Mfg., Co., 388 U.S. 175, 184-185.

Here, the imputation of liability upon the Union is fundamentally inconsistent with the statute. There is no room under the Act for imposing liability on the "premise" that a functioning union must be held responsible for conduct

of its stewards. It is a matter of proof whether in a particular event a person chosen, and acting within the scope of his authority, has engaged in illegal acts subjecting the union, as an entity to liability. The illegal conduct attributed to Worchaz in this case is not the action of the Union's "[agent] in accordance with [its] fundamental agreement of association" and is not a basis for liability of the organization, which, as an institution, has a separate existence from those who are its members, at any given time. Coronado Coal Co., supra, 268 U.S. at 304.

There is no evidence attributing Worhacz' action to the Union. The preparation and maintenance of Willets' shape records was undertaken, solely, in his employer's behalf. This case is distinguishable from one involving the attribution of a steward's conduct to

the union, since the Board, here, associates Worhacz's conduct to an inference of unlawful conduct between Willets and the Union. To look at Worhacz's conduct to determine a reason for Willets' termination of Kuebler and Curd is inappropriate since there is no proof that Worhacz's motivation was attributable to either Willets or the Union as a whole.

The Board found Worhacz to be totally responsible for the maintenance of Willets shape records. Worhaz was acting on behalf of Willets and subject to its control. To hold the Union vicariously liable for this conduct there must be a record basis for believing that it had the right to control Worhacz in these activities. Such power is not inferable from his shop steward relationship to the Union. The record contains no findings regarding the con-

duct of the Union to support the application of respondeat superior to the cause for discharging Kuebler and Curd. General Building Contractors Association Inc. v. Pennsylvania, et al., ___ U.S. ___, decided June 29, 1982.

The Court below relies upon its decision in NLRB v. Local 3, I.B.E.W., 467 F. 2d 1158 (2d Cir. 1972). In that case the court below attributed implied or apparent authority to the conduct of three (3) union members, including a shop steward, in finding that the union violated the secondary boycott provisions of the Act.

In that case the Board found that the Union had a policy which obligated its members to protect the union's work jurisdiction under the threat of penalty. The Second Circuit found:

> "Even if the agent in carrying out the union's policy used means proscribed by the principal, it would not necessarily excuse the union from responsibility. Sheet Metal Workers v. NLRB, 293 F. 2d 141, 149 (D.C. Cir. 1961), cert. denied, 368 U.S. 896 (1961). Protection of union work claims clearly is a policy of Local 3." 467 F. 2d at 1160.

Here, the Board didn't attribute any policy or unlawful motivation on the part of the Union in an effort to associate Worhacz's conduct to an inference of unlawful activity by the Union and Willets. Clearly, any unlawful acts of Worhacz were the acts of an individual, for which there can be no imposition of vicarious liability.

3. THE UNION DIDN'T RECEIVE THE DUE PROCESS REQUIRED BY THE ADMINISTRAIVE PROCEDURE ACT AND THE BOARD'S RULES AND REGULATIONS.

The General Counsel's complaint does not allege that the Union caused the discharges of Kuebler and Curd by Willets. Yet, the Board has concluded

this and the court below has granted enforcement of the Board's order.

General Counsel didn't refer to an allegation of unlawful cause for these discharges in its opening statement; no evidence was introduced that the Union caused their discharges or that Willets was motivated to discharge Kuebler and Curd because of their protected concerted activity, and General Counsel didn't seek to amend the complaint or to brief this subject. Nor, on the record evidence can the Union be held to have consented to a trial of this issue. Thus, the Union did not receive the due process required by Section 554 of the Administrative Procedure Act, 5 U.S.C. Section 554, and Section 102.15 of the Board's Rules and Regulations, 29 C.F.R. Section 102.15. As this Court stated in SEC v. Chenery Corp., 318 U.S. 157, 182

(1971), "an order may not stand if the agency has misconceived the law."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

July 14, 1982

J. WARREN MANGAN

O'CONNOR & MANGAN, P.C.
29-27 41st Avenue
Long Island City, N.Y.11101
(212) 361-7950

Counsel for Petitioner

Appendix A

Judgment of the Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April one thousand nine hundred and eighty-two.

P r e s e n t :

HON. WILLIAM H. TIMBERS
HON. JON O. NEWMAN
HON. RICHARD J. CARDAMONE

Circuit Judges

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRANK MASCALI CONSTRUCTION G.C.P. CO. ET AL.,

Respondents.

JOHN KUEBLER and CHARLES CURD,

Intervenors.

O R D E R

The National Labor Relations Board petitions for enforcement of its August 15, 1980 order against Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("The Union") and Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc. (collectively "Mascali" or "the Company"). The proceeding arises out of activities of the Union discriminating against two dissident members, Kuebler and Curd, in connection with referral for employment. Kuebler and Curd drove trucks for Willets Point Contracting Co. ("Willets"). Mascali, needing drivers, made an arrangement with Robert Worhacz, the Union's shop steward at Willets, to provide Mascali with Willets drivers on days when work was not available at Willets. The Board found that the Union had violated Sections 8(b)(1)(A) and (2) of the

National Labor Relations Act by falsifying the employment records of Kuebler and Curd, refusing to refer them for employment according to seniority practices known as the "shape" system, threatening them with loss of employment and causing their discharge because they exercised their rights under the Act, and by filing false intra-union charges and imposing union sanctions against Kuebler, Curd, and others. The Board also found that Mascali had violated Sections (8)(a)(3) and (1) of the Act by accepting and condoning a referral arrangement with the Union that discriminated against the employees for exercising their rights under the Act. The Board's Order includes cease and desist provisions and affirmative relief, including compensation and reinstatement. The Board determined that the Union is primarily liable and Mascali secondarily liable for monetary awards.

The record contains substantial evidence supporting the Board's Order. Worhacz, angered by the dissident union activities of Kuebler and Curd, threatened to "hurt" Kuebler "in his pocket" and proceeded to do so by departing from the seniority requirement of the "shape" system and denying both of them referrals to which they were entitled. Worhacz carried his retaliation to the point of falsifying the records of their appearance for work, causing Willets to discharge them for what Willets was erroneously led to believe was their failure to observe their obligations under the "shape" system. The Union vigorously contests the findings of violations, but most of its contentions challenge the credibility determinations made by the ALJ and accepted by the Board. We see no basis to disturb them. We also find the record sufficient to support the

Board's finding that Worhacz was acting as the agent of the Union. See NLRB v. Local 3 IBEW, 467 F. 2d 1158 (2d Cir. 1972). We need not determine whether the Board's current test for determining causation when action is taken because of dual motivation, see NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981), cert. denied, 50 U.S.L.W. 3693 (Mar. 2, 1982), is applicable to a Board decision rendered prior to Wright Line, because in this proceeding the Union's essential position was denial of a wrongful motivation, not that a wrongful motivation played only a minor part in an otherwise justified action.

Mascali contends that it lacked knowledge of any discriminatory practices committed by the Union in connection with work referrals of the Willets employees. We and other courts have indicated that employees may be found to have violated Section 8(a)(3) if they delegate to

unions the authority to supply workers, and the unions do so in a discriminatory manner, even if the employer is unaware of the discrimination. Morrison-Knudsen Co. v. NLRB, 275 F. 2d 914, 917 (2d Cir. 1960), cert. denied, 366 U.S. 909 (1961); Pacific Maritime Ass'n v. NLRB, 452 F. 2d 8, 10 (9th Cir. 1971). We need not rest on this principle, however, since the ALJ found, upon adequate evidence of conversations of Worhacz and Kuebler with Mascali personnel, that Mascali should have known, or made inquiries about, the Union's discriminatory manipulation of the referral system, at least by September 2, 1977.

The petition to enforce is granted.

(sgd.) William H. Timbers
Jon O. Newman
Richard J. Cardamone

UNITED STATES OF AMERICA
BEFORE THE TRIAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FRANK MASCALI CONSTRUCTION G.C.P. CO., FRANK MASCALI CONSTRUCTION, CO., INC. 1/ — Case No. 29-CA-5975

and

JOHN KUEBLER, An Individual

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Party In Interest

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and — Case No. 29-CB-3075

JOHN KUEBLER, An Individual

and

FRANK MASCALI CONSTRUCTION G.C.P. CO.
FRANK MASCALI CONSTRUCTION CO., INC.

Party In Interest

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and — Case No. 29-CB-31115

CHARLES CURD, An Individual

and

WILLETS POINT CONTRACTING CORP.

Party In Interest

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case No.
and 29-CB-3235

CHARLES CURD, An Individual

and

ALLIED USED TRUCK EXCHANGE, INC.

Richard J. Coffey, Esq. of Brooklyn, NY, for the General Counsel.
Howard M. Mattson, Esq. of New York, NY, for Respondents Frank Mascali Construction G.C.P. Co., Frank Mascali Construction Co., Inc. and Willets Point Contracting Corp.
J. Warrent Mangan, Esq., (O'Connor, Quinlan and Mangan) of New York, NY, for Respondent Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Burton Hall, Esq. of New York, NY for the Charging Parties.
Ronald Kreisman, Esq. (Heine, Finley, Kumble, Wagner and Underberg) of New York, NY for Allied Used Truck Exchange, Inc.

DECISION

Statement of the Case

GEORGE F. MCINERNY, Administrative Law Judge: The charge in Case No. 29-CA-5975 was filed on October 14, 1977 against Frank Mascali Construction G.C.P. Co., herein referred to as Mascali GCP, by John Kuebler, an individual.

The charge in Case No. 29-CB-3075 was also filed on October 14, 1977 by Kuebler against Local 282, Internal Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as Local 282, or the Union.

The charge in Case No. 29-CB-3115 was filed on November 11, 1977 against the Union by Charles Curd, an individual.

On December 20, 1977 the Regional Director for the Twenty-ninth Region of the National Labor Relations Board, herein referred to as the Board, issued an Order consolidating these cases, together with a Complaint alleging that Mascali

GCP had refused to employ the charging parties, and later discharged charging party Kuebler because the charging parties had been engaged in concerted activities protected by the National Labor Relations Act, as amended, herein referred to as the Act; and, further, that the Union had unlawfully refused to refer the charging parties to employment by Mascali GCP, because of their participation in protected, concerted activity, and refused to process grievances presented by the charging parties because of those protected, concerted activities, and because they had filed charges against the Union with the Board. The Union and Mascali GCP filed answers denying the commission of any unfair labor practices.

Pursuant to Notice contained in the Regional Director's Order Consolidlating Cases and Complaint a hearing was held

at Brooklyn, New York beginning on March 22, 1978. On that day Counsel for the General Counsel moved to amend the Complaint to allege that an agent of the Union engaged in unlawful threats to the charging parties. The amendment was allowed.

The charge in Case No. 29-CB-3235 was filed by Charles Curd on March 7, 1978, alleging that the Union suspended him from membership and expelled members John Kuebler, Ted Katsaros and Lawrence Kudla because they filed charges and gave testimony under the Act. On April 19, 1978 the Regional Director for the Twenty-ninth Region issued a Complaint alleging that the Union had suspended or expelled these members because they filed charges and gave testimony under the Act, and because they had engaged in protected, concerted activities, all in violation of the Act. The Union filed an answer de-

nying the commission of these alleged unfair labor practices.

Thereafter, on June 19, 1978, during the hearing, Counsel for the General Counsel moved to consolidate Case No. 29-CB-3235 with the cases then being heard. This motion was allowed, and the hearing continued at various dates until concluded on September 25, 1978. 2/

Following the close of the hearing briefs were filed by the General Counsel, and by counsel for Mascali GCP. The Union has filed a letter in the form of a memorandum brief. These have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Employer's Business

A. Frank Mascali Construction G.C.P. Co. is a New York corporation having its

principal office in Flushing, New York, from which headquarters it performs road building and related services. During the calendar year prior to the issuance of the Complaint herein, Mascali GCP purchased and caused to be transported and delivered to its place of business goods and services valued in excess of $50,000 directly from points outside the State of New York.

The Complaint alleges, the Answer admits, and I find that Mascali GCP is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. Frank Mascali Construction Co., Inc. is a New York corporation having its principal office in Flushing, New York, where it is engaged in the manufacture, sale and distribution of asphalt and related products, and in providing and performing road building and related

services. In the calendar year prior to the issuance of the Complaint Frank Mascali Construction Co., Inc. purchased and caused to be transported and delivered to its place of business goods and services valued in excess of $50,000 directly from points outside the State of New York.

The Complaint alleges, the Answer admits, and I find that Frank Mascali Construction Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

C. Willets Point Contracting Corp.,3/ herein referred to as Willets Point, is a New York corporation having its principal office in Flushing, New York from which headquarters it is engaged in the manufacture, sale and distribution of asphalt and related products, and in the providing of road building and related services. In the calendar year prior to the issuance of the Complaint Willets Point purchased

and caused to be transported and delivered to its place of business goods and services valued in excess of $50,000 directly from points outside the State of New York.

The Complaint alleges, the Answer admits, and I find that Willets Point is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

D. Allied Used Truck Exchange, Inc., herein referred to as Allied, ia s New York corporation having its principal office in Flushing, New York, where it is engaged in the purchase and sale of used trucks. During the calendar year prior to the issuance of the Complaint herein, Allied has sold trucks valued in excess of $50,000 directly to customers located outside the State of New York.

The Complaint alleges and I find that Allied is an employer engaged in commerce within the meaning of Section 2(2), (6)

and (7) of the Act.

II. The Labor Organization Involved

The Complaint alleges, the Answers admit, and I find that Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background

1. Willets Point

Willets Point Contracting Corp. is the successor to a company called Columbia Asphalt, Inc., which, in turn, was the successor to Tully and DiNapoli.[4/] For some years, the company was one of the largest employers in the asphalt supply and paving industry in New York City. By the time that the events in this case begin to unfold the company had suffered severe financial reverses. In April of 1975, 25 of the company's 48 pieces of equipment

were repossessed and sold. The Company's seniority list for truck drivers, which at one time had included 60 to 65 names, was reduced to 40 by the middle of 1974 and in October of that year, to 15 names. This list was subsequently raised to 17, and during the time material to this case, it included 16 names on a permanent basis, with one or two people listed intermittently. In December of 1975 another 5 trucks were sold, leaving Willets Point with 10 trucks available for its Teamster employees to drive.

Willets Point has for some years been part of a multi-employer group which in turn has negotiated collective bargaining agreements with local 282 covering chauffeurs engaged in the hauling of concrete, sand, gravel, asphalt and bulk cement under one contract, referred to herein as the ready-mix agreement, and engaged in heavy construction and excavation under another.

Coverage under these contracts depends on which function the chauffeur is engaged in at any particular time. The most recent of these dual agreements covered the period for July 1, 1975 to June 30, 1978.

The ready-mix agreement provided in Section 3 that:

> "Eight (8) hours shall constitute a day's work. The day shift shall be 8:00 a.m. The employer has the right to have men shape[5] at 7:00 a.m. and at 7:30 a.m. as well as at 8:00 a.m. Lists will be posed (sic) before the close of the preceding work day and men will shape at the time for which they are posted."

The only other contractual reference material to the issues in this case[6] occurs in Section 15 where it appears that there is understood between the parties a need to "shape regularly" which need may be averted by procedures outlined in Section 15 for layoff in times when work is not regularly available.

2. The Shape System

Willets Point, together with all of

the employers in the asphalt and paving business operating under the agreement with Local 282, assigns work to its employees under a set of rules and practices known as the shape system. While these rules and practices are nowhere written down, all of the witnesses who testified in this proceeding had worked with the system for many years and were all in agreement on its general outlines and function.

The shape system is based primarily on seniority. Each employer, including Willets Point maintains a seniority roster of its employees. Under the contract the shop steward's is the first name on the list, the other employees following in order of seniority.

At Willets Point, the list, containing 16 names, is reproduced on a sheet of paper which also has spaces opposite the names of the employees for the day of the week,

and for assignments of work, including the truck number, reporting time, and the job to which the employees is assigned.

Each afternoon, between 3:30 and 4:00 a.m., the superintendents of the jobs on which Willets Point trucks are being used call the dispatcher's office and indicate the type of equipment they need, the reporting time, and the location of the job. The dispatcher /together with the shop steward then makes the assignments for the next day. Under the shape system, assignments should be made according to seniority with the senior man accorded the privilege of taking the earliest start in the morning in order to assure him the most contractual overtime. In practice, however, the senior man can waive this requirement for personal convenience, or any other reason.

When it has been determined which men are to go to what jobs, the assignment

is written on the copy of the seniority list in the spaces provided. This sheet is retained in the dispatch office for the later use of Willets Point management. Another copy of the same list is then prepared and posted in a trailer located outside the dispatch office. This is required to be done before 4:30 in the afternoon so that drivers coming in at the end of their work day will know the time of their next day's assignment. If the list is not posted by 4:30 the employer will be liable for overtime pay to drivers who must remain after that hour to learn of their next assignment.

The times at which drivers are posted to go out are called "shape times" and may be set at any time[8/] If trucks are scheduled for 7:00 a.m., that is then referred to as a "7 o'clock shape" meaning that 7:00 a.m. is the hour when the men scheduled for that hour must report, ready

for work. The latest time when trucks are scheduled to depart is 8:00 a.m. and 8 o'clock is referred to as the "last shape of the day."9/

Throughout the period covered by this case, work was slow at Willets Point. Aside from the financial reverses suffered by the company, the industry generally had slowed down with a general decline in construction in the City of New York. With the sale of five more trucks in December of 1975, Willets Point had only ten vehicles for its senority list of 16 names. Thus, the list posted in the trailer each evening would have no assignments opposite the names of some of the employees. Historically, the obligation of these employees was to report, or shape, every morning before the 8 o'clock shape, ready to go to work. Failure to shape in these circumstances could result in their removal from the seniority list.

At least it left them vulnerable to a challenge by another employee, or by the employer, that they were not reporting, or shaping, and that they had forfeited their right to maintain their positions on the list. Shaping on a daily basis, under the traditional standards and practices of the shape system, was required even under circumstances where, as in this case, months went by without work opportunities for the shapers.

The physical act of shaping is accomplished by walking into the trailer, variously described as the "shape trailer," the "shape shack" or the "shape room," ten or fifteen minutes before the time of the shape, and then just sitting down and waiting. There is no sign-up, and no place to initial or indicate in any permanent manner that anyone has been there at any particular time. If work is available either the dispatcher[10/] or the shop steward[11/]

will come from the office to the shape trailer and give their assignments to the senior employees who are shaping, along with their time assignments to the senior employees who are shaping, along with their time cards and any documents necessary for their job. These employees then punch the time clock in the trailer and leave. At that point the shape is over and if any other employees are left over, they may leave. If it is the last shape of the day, they go home. If no work is available, the steward or the dispatcher may visit the shape trailer or they may not. The sheet posted in the shape trailer showing the assignments is then taken down and filed[12/] Other than listing the assignments this sheet does not show who shaped (and didn't work) on a particular day, and who didn't.

Naturally, in a system such as this there are bound to be changes. In con-

struction, where the work of the various crafts employed must be dovetailed one with the other, changes in assignments and starting time are inevitable. When orders were received from superintendents or foremen in the filed, Richard Moore testified that he made the changes on the assignment sheet in the office and sent shop steward Worhacz out to change the shape sheet. At that time Moore was primarily responsible for the maintenance of the records 13/With Moore's departure in April of 1976 this function was taken over by Worhacz who continued to keep the records submitted in this case. Worhacz apparently continued the same practice although admittedly there were times when the starting times given on the shape sheet and Pual's copy did not match up.

There is no problem where the changes are received and noted before 4:30 p.m., and no difficulty with changes in equip-

ment or location which are ordered after that time. The difficulty comes with an order for a change in time after 4:30. The driver checks his reporting time when he punches out in the shape trailer around 4:30 p.m. If that time is later changed to an earlier start, and he reports as originally scheduled, he will lose the additional overtime pay provided in the contract for an earlier start. On the other hand, if the start is postponed to a later time, and he reports as originally scheduled, the employer is responsible for overtime pay from the time of the original start. In Moore's time, Worhacz would call the drivers if the changes came in before those two left for the day, but Worhacz testified that this practice was discontinued after Moore left. If the change came in in the morning the seniority system was not flexiable enough to allow for substitutes at that time, although if a

scheduled driver did not show up, the senior shaper would take his assignment.

Another change occurred in the late summer or early fall 1974 when it was decided that the shape requirement at Willets Point would be reduced to one day a week.[14] This action was decided upon at a meeting of the Willets Point employees and their shop steward, Worhacz.[15] The lack of work at Willets Point, the gasoline shortage, and the fact that many of the men had to drive long distances in order to shape and protect their seniority were the reasons for the change.

Under the modified shape system, a man could protect his seniority by shaping one day a week, on any day he chose, or irregularly if that suited him.[16] On the other days he was free to seek work elsewhere. On those days when it became apparent that a man's name would be reached on the list for the next day,

the steward would call him on the telephone and tell him what time to report.[17] If, however, work became available in the morning, either because an assigned driver reported off for some reason, or if, as frequently happened, a call came in from another employer looking for a driver.[18] The procedure in these situations was to assign the work to the senior man actually shaping on that day, as it was manifestly impossible to make telephone calls and have a man report from his home in time to satisfy the primary obligation which, all parties agreed, was owed to the employer. However, it is also manifest in the record that the accepted reporting time for unassigned employees to shape was 8:00 a.m. Thus, in a situation where the last shape of the day was at 8:00 a.m., if a call came in from an outside employer for a man for a 7:30 start, or if one of Willets Point's own employees scheduled

for a 7:30 start called in sick, the senior man shaping could be given the assignment. If a man with more seniority came in at 7:45 for the 8:00 a.m. shape, he would be in a position to claim a day's pay from the employer.

There is some difference in the testimony about this circumstance. Worhacz stated that men shaping and looking for work should and did report at 6:30 or earlier, and that his practice was to send out the senior man shaping as calls came in. Richard Moore, on the other hand, testifying about a situation similar to that given in this previous paragraph, stated that it was within the discretion of the steward and the dispatcher to send the senior man present out, or to hold the truck until the 8 o'clock shape to see if a more senior man would shape. Contrary to Worhacz's assertion, Business Agent Edward McFarland testified that at one

time the practice referred to by Worhacz of shaping early and picking up casual assignments had resulted in a rash of complaints and claims. McFarland stated that he had came down to Willets Point and ordered unassigned employees not to shape before 8 o'clock. This was confirmed by other employee witnesses, and I find that this was in fact the practice.

Thus I find that under the one day a week system an employee with seniority was obliged to shape on that one day at 8 o'clock, and that if the last shape of the day was at 8 o'clock on that day, and if work became available that day, the senior man appearing for the 8 o'clock shape would be entitled to work assignment, or a claim for a day's pay, if a junior man had been dispatched ahead of him.

This was the situation at least up to January 27, 1977. At that time, according to Worhacz, McFarland came to Willets Point

and spoke to the employees, including charging parties John Kuebler and Charles Curd, expressing his displeasure with the one-day a week shape, ordering that it be discontinued and directing further that there be no more telephone calls. Despite the fact that this testimony was corroborated to some extent by employees Alfred Nicolai and Frank Fitzpatrick,[19] I do not believe it. McFarland himself did not corroborate Worhacz's version of his talk to the employees, although asserting that he had spoken to them in that vein on January 6, 1976. But both Worhacz and McFarland had testified on February 8, 1977 in the Brudie case before Judge Kaplan that the one day w eek shape was still in effect. Worhacz's own testimony reveals that he continued the one day a week shape at Willets Point without consulting either McFarland or the management of Willets Point. At another point in his testimony

Worhacz admitted that telephone calls continued to be made after January 27, and this was corroborated by the credible testimony of employee Arthur Christman, who related that he had received a number of calls from Worhacz assigning him to work after January of 1977. Further, Charles Curd testified credibly that at the January 27 meeting McFarland stated that if they shaped once a week they held their seniority. Finally Worhacz's records in evidence here show that the daily shape requirement was universally disregarded. Accordingly, I find that the one day a week shape continued through the period covered by this case.

3. Kuebler and Curd, Background and Relations with Local 282

John Kuebler had at the time of this hearing been a member of Local 282 for 37 years. He had also been employed as a driver for Willets Point and its pre-

decessors, Columbia Asphalt and Tully and DiNapoli, since 1968. Despite this length of service the extent and depth of the cuts in the Willets Point seniority list left Kuebler in 1977 in the 15th position, next to the last name on the list.

Charles Curd has been a member of Local 282 since 1964, and a driver for Willets Point since 1966. During 1977 Curd was number 12 on the Willets Point seniority list.

Because of their positions on the seniority list, during 1977, and the sporadic and desultory amount of work available, it is evident from the employment records in evidence, the shape sheet and Paul's copy, as well as a third, more complete, documents maintained by Worhacz primarily for the purpose of checking on the payroll department, that work opportunities were rare for Curd and almost nonexistent for Kuebler. This circumstance naturally en-

gendered an atmosphere in which the competition for work was intense and the motives and actions of those responsible for the assignment were subject to suspicion or misinterpretation by those to whom assignments were not made. I have tried to keep this factor in mind throughout my consideration of the facts in this case.

The record shows that Curd and Kuebler, particularly the latter, vigorously, even relentlessly, pursued violations of the contract or the seniority system through whatever channels were available for such pursuit.

In October of 1974, with the reduction of the Willets Point seniority list to 15 names, Kuebler found that he was number 17 and, therefore, off the list. He protested and the Union managed to persuade the employer to add two names, leaving Kuebler still number 17, but on the list.

Kuebler then proceeded to challenge the seniority of two employees who were above him on the list, securing their removal from the list and his advancement. He secured also the admitted resentment and anger of Business Agent McFarland who bitterly recounted in his testimony that one of those men removed from the list was "a sick man just trying to work a few days for his pension" and the other was dead within two weeks of his removal from the list. Despite this there is no indication prior to the end of 1976 that the Union failed in its duty to process Kuebler's or Curd's grievances even though the end results may have seemed unsatisfactory to them.

Kuebler also had his trouble with Worhacz. There is no evidence of particular or exaggerated problems between the two before November of 1976.[20/] Kuebler did testify that he had opposed Worhacz's se-

lection as shop steward in April of 1974, but the record reveals no countermeasures taken before 1976 by Worhacz because of Kuebler's opposition. In any event there was very little that Kuebler, as an individual, could do about the selection of the shop steward.[21/] Worhacz did, however, show his animus and hostility toward Kuebler in his testimony. Worhacz maintained that he and other employees of Willets Point bitterly resented Kuebler's employment by a neighboring employer, Allied Used Truck Exchange (of which more later) during 1976. How much of the anger which showed through clearly in his testimony was a sham, I cannot say. In September of that year, Kuebler and John Poulos approached Worhacz to complain about his handling of grievances. According to Kuebler's credible testimony, Worhacz responded by telling Kuebler to "buzz off" and stop making claims or Worhacz would

beat him up. Then, on November 28, Curd had shaped and had an opportunity to work. He and John Poulos, both of whom were senior to Kuebler, agreed with Kuebler that he could take out the run so that he would qualify for unemployment benefits. They went to Worhacz with this proposal. Worhacz demurred, saying he would have to call Konzelmann, the only other employee between Curd and Kuebler on the list to see if he wanted to come in and take the job. He did so, Konzelmann did not want it, so Kuebler worked on that day, the last day, incidentally that he ever worked for Willets Point.

After Kuebler left, Worhacz, according to Curd's credible testimony, turned on Curd and berated him, stating that Kuebler was a trouble maker and that he, Worhacz, wanted to hurt Kuebler "in his pocket".

Worhacz denied these statements, but for reasons given below, I do not credit

this denial.

In any event, the requirement asserted by Worhacz that he had to call senior men at the morning shape is inconsistent with what I have found to be the practice under the one day a week shape. That practice allowed the most senior man present to take an assignment at 8 o'clock, or at the last shape of the day and did not provide for telephone calls in the morning. I thus find that this action was taken by Worhacz to inconvenience Kuebler, and, possibly to cost him a day's pay and hurt him "in his pocket," if he could.

Curd cited another example of disparite application of the practice in two incidents which occurred a day apart in January of 1977. On the 24th, Curd and two other employees shaped Willets Point. Later that day it snowed and Worhacz received a call from the Aqueduct racetrack for trucks to help remove the snow.

According to the practice, Worhacz called three men senior to Curd who had protected their seniority by the one day shape. Curd did not work. On the next day Worhacz called Curd and asked if he wanted to work. Curd said that he did, and Worhacz replied that there might be a problem because Konzelmann, a man junior to Curd, had shaped that morning, and that he would call back. He never did call back. [22]

In January or February of 1977 [23] Kuebler again asked Worhacz to get him a layoff slip from Willets Point. [24] He did not get it, asked McFarland and got no results, then, in May called the new Business Agent Mike Carbone and received a slip of paper which did not satisfy him. [25] He took the slip to Worhacz together with copies of slips others had received from other employers. Worhacz told him that he wasn't going to get a layoff slip and that Worhacz would keep him shaping. While there is no

evidence that anyone else got a layoff slip, there is no evidence that anyone else requested one. Further, the Ready-mix contract provides in section 15 that:

> "When regular employment is not available for an employee he shall be laid off for lack of work. During such layoff the employee shall retain seniority without the need to shape regularly."

Under this provision it would seem clear that, unlike the situation in the Brudie case, the employer had no choice but to grant a layoff upon request. This incident, while it may have occurred within the six-month period prior to the filing of the charge, is not alleged by the General Counsel as an unfair labor practice, so I can make no finding of a violation of law based on these facts. However, the effect of Worhacz's decision will be seen as the facts continued to develop.

4. The FORE Association

In January of 1977 Kuebler joined an

organization called FORE[26] FORE had been founded sometime in 1974 or prior thereto by members of Local 282 who were dissatisfied with the Union's leadership, and membership was and is restricted to people who are also members of Local 282. It does not appear that the purposes of FORE are other than the reform of Local 282, but in pursuit of these goals, FORE has engaged in organizing members through personal visits to various work locations, distribution of leaflets, preparation and publication of a newsletter sharply critical of Local 282's current leadership, and the fielding of slates of candidates for office in Local 282's elections.

The most prominent and active adherents of FORE are Ted Katsaros and Lawrence Kudla.[27] Katsaros has been a member of Local 282 since the spring of 1960. He primarily worked for a company called Colonial Sand and Stone, but also for other

employers. Katsaros was always interested in Union affairs but, apparently dissatisfied with the manner in which those affairs were conducted, he joined FORE in January of 1974. By the spring of 1975 he had assumed an active role in FORE, coorindating clerical work, writing the newsletters and trying to work out an accommodation with another dissident group within Local 282. Then, in the fall of 1975, Katsaros headed the slate of candidates for office in Local 282, running for President of the Local. He campaigned through the fall, and after the election on December 8, when the FORE slate was badly defeated, led a protest of the election through the procedures provided by the Union's constitution and by-laws, and when that proved fruitless, to the United States Department of Labor.

After this protest failed Katsaros continued his active role in FORE, speaking

out at general membership meetings of Local 282,[28/] and was again a candidate for President of the Local in the election scheduled for December of 1978.

Kudla has been a member of Local 282 since March of 1970. He became a member of FORE in the latter part of 1974. He also assumed an active role in its affairs, became its recording secretary, worked on the newsletter and passed out literature to other members of Local 282. In the election campaign of 1975 Kudla nominated Katsaros for President of Local 282 and his father, Walter Kudla acted as a checker at the election for the FORE slate and helped to prepared the election protest and the appeals from the successive denials of that protest.

After he joined FORE, Kuebler joined in the organizational activities of the other FORE members including visiting other job locations and passing out FORE litera-

ture.

In June, Curd also joined FORE. At the end of that month Curd, Kuebler, Kudla and Katsaros were in a restaurant located near Willets Point when Worhacz came in and saw them. A few days later Curd shaped at Willets Point. Worhacz told him "you are hanging out with some pretty bad guys at McDonald's. Those are all FORE guys." Curd replied that he joined FORE. Worchac shook his head and walked away.

During the early part of 1978 Katsaros and FORE managed to generate some local publicity for themselves in the New York area. Katsaros was interviewed by a Long Island newspaper, and appared on a local television show airing the differences between FORE and the incumbent officers of Local 282.

5. The Poulos Petition

In January also, but apparently unconnected with the FORE activity, an em-

ployee of Willets Point named John Poulos[29] was dissatisfied with the treatment he was receiving from Worhacz.[30] Poulos prepared a petition directed to Local 282 and asking for the removal of Worhacz as shop steward. He also prepared a letter which he sent to all of the drivers in the Willets Point list in opposition to Worhacz. Kuebler signed the petition but he was the only driver, other than Poulos himself, who did sign it. In turn, Worhacz prepared and circulated a petition supporting his stewardship. Curd did not sign Poulos' petition becuase, as he testified, he was afraid of Worhacz, but he refused to sign Worhacz's petition.

During the time when both petitions were being circulated, Arthur Christman, the eleventh man on the Willets Point list, initially signed Worhacz's petition, then crossed his name out. Later, Carmine Tufano II[31] the assistant shop steward[32]

approached Christman and asked why he had crossed his name off the list. Christman replied that he and Worhacz had to have a talk.

When Worhacz returned from vacation in March they had their talk. Worhacz told Christman, according to the latter's credible testimony, that he should stop hanging around with the crowd he was hanging around with and urged him to "sign the petition and get on my team." He assured Christman that he took care of the men on his team. Later Tufano II came around with Worhacz's petition and Christman signed it.

In late May or early June, Worhacz told Christman that he had got Konzelmann a job at Grace, another employer of drivers. Worhacz, in yet another conversation in late May or early June, again warned Christman about his assocations, saying "if you hang around with squares, you get

the name of a thief." Christman told Worhacz that he couldn't pick Christman's friends, that Charlie (Curd) was his friend and Worhacz couldn't tell him who to hang around with.

According to Worhacz, Poulos' petition was withdrawn by Poulos himself, accompanied by a public apology on the floor of a Union meeting.[33/]

6. The Mascali Arrangement

Frank Mascali Construction Co., Inc. has been in business since 1969, primarily in road construction for the City of New York, New York State and the Port of New York Authority. Early in 1977 the Mascali company bid on and was awarded a contract by the State of New York for almost 14 million dollars for reconstruction and repairing of a portion of the Grand Central Parkway on Long Island. Mascali had neither the men nor the equipment from other companies. Job Superintendent Joseph

Paternostro[34] was hired from Willets Point, and possibly other[35] and a separate corporation, Frank Mascali Construction G.C.P. Co. was set up to conduct the operation.

After the contract was awarded, but before construction actually began, Business Agent Edward McFarland went to see Mascali's Asphalt Plant Superintendent and Treasurer Charles R. Mascali.[36] There are three different versions of how he came to go there. McFarland himself testified that he read of the award of the contract in the Dodge Reports, a trade papers. Charles Mascali testified that after he had already decided to use Willets Point drivers, as well as their supervisory people and equipment, McFarland showed up. Worhacz testified that a meeting was held at Willets Point concerning the Mascali job between himself, McFarland, and Gerald (or Jerald) Tully, one of the owners of Willets Point. Tully explained that they

would supply materials, foremen and superintendents to the GCP job but he had no responsibility for drivers. After this meeting McFarland told Worhacz that he would see if he could do something (about the drivers) on his own. He then went over to Mascali's office.

I do not have to resolve these three versions. In fact all could be more or less correct, but in any event McFarland arrived in Charles Mascali's office and they talked about the use of Willets Point drivers on the GCP job.

Charles Mascali testified that this was a business arrangement, pure and simple, which Mascali had worked out ahead of time and presented to McFarland. The latter made no rebuttal to the arrangement, and in fact he was happy about it.

McFarland, on the other hand, asserted that it was he who proposed the arrangement to Charles Mascali that when they

needed drivers they would go first to Willets Point and then to Edenwald for men.

Whatever the motivation, or from whence came the impetus is not important, although I generally credit McFarland's testimony in this as well as in other areas. The result was agreed between Charles Mascali and McFarland, and on this there is no difference in the testimony, that Mascali's day superintendent, Paternostro would call Worhacz at Willets Point first, when drivers were needed, then Edenwald, then Grace, and then wherever he could get drivers.

McFarland considered this arrangement a victory in his 30 years war against "gypsy" trucks and, while he did not consider the arrangement to be in the same category as a written collective bargaining agreement, he did consider it binding on Mascali, and if it was not honored he "would have struck him." Charles Mascali

considered it binding as well, as will be shown by his treatment of Kuebler on and after September 2. It may be noted that the employees at Willets Point were not notified of this arrangement in any formal way. However, Christman testified that he was aware of it in May and Kuebler also stated he found out that employees were going to Mascali in that month.

The GCP project got underway in March of 1977. The hiring arrangements for the day shift were in the hands of Joseph Paternostro. His procedure was first to call one Steve Costa at Mascali Construction each afternoon to see how many of Mascali's own employees would be available the next day. If Mascali could not fill his needs, Paternostro would then call Worhacz at Willets Point, then Edenwald and Grace. Other employees would then be called until enough employees were secured. The first referral from Willets Point took place on

May 2.

7. Credibility

During the course of this discussion of the background to the events alleged in the Complaint to constitute unfair labor practices, I have made certain findings based on the credibility of witnesses for the General Counsel and the Respondent Union. In making these findings I have, first relief on undisputed facts, agreed upon between the parties by stipulation or consistent testimony. Second, I have relief on documents, records or letters where those are available, to establish the truth between inconsistent assertions. Third, when evaluating the testimony of the three major witnesses, Kuebler, Curd and Worhacz,[37/] I have weighed their assertions against the testimony of others, the documentary evidence, and the inherent probabilities of the particular situation. Fourth, I have considered the

demeanor of the witnesses, weighing my impressions and feelings in this regard together with the logic of the other standards to arrive at my findings in matters which are disputed.

Using these standards, then, I have generally credited the testimony of Kuebler and Curd in material areas, and have not credited the testimony of Worhacz in those areas.

Worhacz's credibility is flawed in the first, and perhaps most important instance by his inconsistent testimony in the Brudie case concerning the one day a week shape. He said, while testifying on February 8, 1977, that the one day a week shape was still in effect. Judge Kaplan believed him and found that the one day shpe was in effect and that Brudie was properly removed from the seniority list because he hadn't shaped for two years. I have read the transcript in the Brudie case,

an exhibit in this case, and find no reason to disagree with Judge Kaplan's findings. But Worhacz testified in this case that the one day a week shape was terminated on January 27, 1977 and, while he took a tolerant view of the continuing practice, the practice of telephone calls to alert employees of available work ceased at that time. In these circumstances Worhacz lied either in the Brudie case or in this case. Further his testimony as to the telephone shapes, a telephone calls, was directly contradicted by Arthur Christman, who I find to be a credible witness. Christman told of repeated telephone calls from Worhacz when work began to pick up in the late spring and summer of 1977. This I find and conclude that Worhacz did not testify truthfully about the end of the one day a week shape in January 1977.

Further, while Worhacz's shape

records were carefully maintained, and relatively free from inadvertant error, reference to his record for August 25, showing that Curd did not shape, is belied by the fact that Curd not only shaped, but, while in the shape trailer, stole the shape sheet off the wall.

Considering Worhacz's demeanor, his hostile and defensive attitude, whether on direct or cross examination, and his arrogant and openly contemptuous responses while the General Counsel was attempting to adduce information on the shape system and Kuebler's relation to Allied Used Truck Exchange tends to convince me that he would not have responded or acted as he said he did toward Kuebler and Curd, but rather that their descriptions of his arrogance, contempt and hostility more accurately reflect the actual events, given the character of the people involved.

Curd's testimony also presents

difficulties. If he had not kept a diary, he might have presented less of a problem, but he did. He kept a diary showing his day-to-day activities, but prior to this hearing, he had expunged the bulk of the entries, leaving only cryptic references to activities or numbers. His stated reason for this, that he feared reprisal from the Union against people and employers listed is plausible, but his assertions that he could not remember what any of the entries were, or stood for, is plainly incredible. Curd showed otherwise that his memory was not that bad.

In addition to this credibility problem, Curd at one point simply refused to answer questions posed on cross-examination which concerned his relations with government agencies other than the National Labor Relations Board. Although he later returned to the witness stand, and did answer the kinds of questions he

had refused previously to answer, Counsel for the Union moved to strike all of his testimony. I reserved ruling on this motion at the hearing.

Certainly, if Curd had persisted in his refusal to answer proper questions, it could have resulted in rendering all of his testimony incompetent, and such circumstances I would have been justified in striking all of his testimony. 38/ However, there are two distinguishing factors here. First, Curd did return to the witness stand and did answer all questions put to him, and, second, it does not appear to me that the particular questions, concerned with Curd's contacts and dealings with representatives of other governmental agencies, are really relevant to the issues in this case. The questioning is too remote from those issues to be relevant for the purpose of impeaching credibility. Therefore, I deny the motion

to strike all of Curd's testimony.

With respect to the credibility of that testimony, he lied about the contents of his diary in the sense that he testified that the deleted portions concerned only the names of persons he did not want identified for fear of reprisal, and other references to his private business. I believe, in fact, that the diary showed jobs and income which he received during the year which, for some reason, he did not want the Union, or anyone else to know about.

I do not feel, however, that this lapse requires that I disregard those parts of the diary that Curd did testify about, nor the remainder of his testimony concerning events unconnected with the diary. In his direct testimony, and on cross-examination concerning incidents with Worhacz, McFarland, and other Union officials, his testimony is corroborated

by Christman, as noted above, and by McFarland and Robert Sasso with regard to the August 31 meeting and its aftermath. I further find that Curd's demeanor while testifying was open and candid, to the extent that the lies about the diary were telegraphed by his face, his voice and his manner. I did not receive similar messages from his demeanor while testifying about other issues. Thus I find Curd to be a generally truthful witness, except in the areas noted, and I deny the motion to strike all of his testimony.

John Kuebler presented less of a problem. In Kuebler's case, he told a straightforward story in a manner which was simple and candid. While I suspect he played down the closeness of his relation with Allied and the frequency of his associations with that company, his demeanor, and the corroboration of significant portions of his testimony by

Charles Mascali, Katsaros, Kudla and Robert Sasso and by reference to Worhacz's records compel me to credit Kuebler's testimony.

I will make additional findings on credibility as other incidents are discussed, but the conflict between the testimony of Kuebler and Curd, on the one hand, and Worhacz, on the other is critical to all of the substantive issues in the case.

8. Summary and Background

This extensive treatment of the background of this case is, I think, necessary for an understanding of the issues, the alleged violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and 8(b)(2) of the Act by the Respondents. Thus an understanding of the employment situation at Willets Point, and the operation of the shape system tend to explain the mutual obligations of the charging parties,

Kuebler and Curd, the Union; a recounting of the relationships between Kuebler and Curd, FORE, Worhacz and the Union seems to point up the conflicts and animosities which influenced those relationships from the mid-1970's on; and the history of the Mascali company, the GCP job and the arrangement with the Union set the stage for the later dealings between Mascali and Kuebler.

B. The Alleged 8(b)(1)(A) Conduct

As has been noted, Willets Point had suffered severe financial problems resulting in the forced sale or repossession of much of its rolling stock and a consequent reduction of its seniority list from a high of about 60 to 65 employees to 15. At the time of the events in this case, the list contained the following names, in their order of seniority:

1) Robert Worhacz 39/

2) Carmine Tufano I

3) Alfred Nicolai

4) James O'Regan

5) Carmine Tufano II 40/

6) Rodney Mohr 41/

7) William Alberti

8) Manuel Hernandez

9) Frank Fitzpatrick

10) Robert Procida

11) Arthur Christman

12) Charles Curd

13) Jerry Konzelmann

14) John Poulos

15) John Kuebler

Buster Holmes 42/

There was testimony that the availability of work is low during the winter months, and then picks up in the spring. While no records for times before April 18, 1977 were introduced in this case, there was no disagreement on the lack of work in cold weather. Indeed the shape sheets for the period from April 18 until

after Memorial Day show that posted work (work called for the night before it was to be performed and posted at 4:30 that evening on the bulletin board in the shape trailer) for the weeks of April 18, April 25, May 2 and May 9 was available only though number 7 on the list, William Alberti. In the week of May 16 only 6 names were posted for Monday the 16th and Friday the 20th, with an indication that several more were posted for the 17th, 18th and 19th. Similarly in the week of May 23 only 6 names were posted for the 23rd, 24th and 25th, but 10 names for the 26th and 9 for the 27th. Beginning on May 31, the average is 9 names posted, and beginning in the week of June 20 the posting of 10 or 11 names is faily consistent through the week of October 31 which ends the series of records in evidence here.

Although there were 6 weeks in this period when 11 names were posted for the

whole week, and a small number of days when this was so, there was no time through the whole period that 12 names were posted. Thus Curd, who was number 12, was never posted in advance to work during this season. It goes without saying that none of the names below Curd's including Kuebler's, were posted.

Since at no time during this period were Curd and Kuebler posted with a starting time for the next day they were obligated to shape once a week in order to maintain their seniority. As both Curd and Kuebler stated, as verified by McFarland, and as I have found, the obligation to shape included the obligation to be in the shape trailer at or just before 8:00 a.m., not before and not after. However, the shape sheet does not itself contain any place where a man shaping can indicate that he has done so, and there was no other practice whereby a shaper

could punch the time clock in the shape trailer, or signal the dispatch office, or in any way establish proof, by mutual understanding between the shaper and those in the dispatch office, that he was really there on any particular morning. In the case of Willets Point the only record of who shaped and who did not was kept initially on what was referred to in this case as "Paul's Copy" a duplicate original of the shape sheet, but which was maintained in the dispatch office. 43/ The only thing a shaper could do was to maintain his own records or some notation of his shaping.

Kuebler and Curd both kept such records. A comparison between Kuebler's records (and his testimony) and Paul's Copy follows listed by month and date for the period between April 18 and October 21:

Kuebler's records show that he shaped

April 18, 25

May 2, 9, 16, 23, 31

June 6, 7, 13, 20, 27

July 5, 12, 18, 25

August 1, 8, 15, 22, 29, 31

September 9, 12, 19, 26

October 3, 11, 17

Paul's copy shows that Kuebler shaped

April 18, 25

May 2, 9, 16, 23

June 6, 7

July - None

August - None

September 12

October - None

Thus these records agree up to June 7 (with the exception of May 31) but are totoally inconsistent (with the exception of September 12) from that point until Kuebler's termination by Willets Point in October.

Curd also kept records, about which

there has already been some discussion, and the portions of these records which refer to shaping were stipulated by the parties to reflect his testimony if he were asked when he shaped at Willets Point. Any analysis of Curd's records and testimony compared to Paul's Copy shows the following in the period from April 18 to October 21, by month and day:

Curd's records show that he shaped

April 18, 28

May 2, 9, 16, 23, 24, 25

June 1, 6, 7, 9, 13, 20, 27

July 5, 12, 21, 25, 28

August 1, 8, 15, 25, 29, 31

September 7, 8, 12, 15, 22, 27

October 3, 11, 17

Paul's copy shows that Curd shaped

April 18, 25, 28

May 2, 9, 23

June 1, 6, 7, 9

July 5

August 15, 29

September 1, 7, 12, 15 21, 27

October 11

Again, as in Kuebler's situation, the records agree fairly well up to the first week in June, then show quite different facts, although the disparity is not as great as in Kuebler's case.

There was testimony, mostly from Worhacz, that the recordkeeping function at Willets Point was a joint obligation of the dispatcher and the shop steward. Richard Moore testified that this was so at the time he was the dispatcher at Willets Point and its predecessors from 1956 to 1976. He testified, credibly, that he devised the forms used, even for the records which Worhacz described as his personal records. It seems apparent, however, that following Moore's departure in April of 1976, and during the period when Paul Tully was filling in as dispatcher,

Worhacz took over the recordkeeping function completely. The records themselves, the shape sheet, Paul's copy, and Worhacz's personal records, are maintained almost entirely in his hand. In his rare absences, at least for the period covered by this case, the records were kept by the assistant shop steward, Carmine Tufano II. Frank Daley, who was hired as the dispatcher about July of 1977 did testify that he was involved in the preparation of Paul's copy, but admitted that "for the most part" Worhacz made up the records. Daley's involvement apparently was merely to pass information on to Worhacz, who actually prepared the records. Thus it appears, and I conclude, that Willets Point has in fact delegated the power to keep work records and make assignments of work to the Union shop steward on the job.

It is then necessary to determine whether, as alleged in the Complaint,

Worhacz used this power to discriminate against Kuebler and Curd, and to deprive them of work to which they would otherwise have been entitled, or whether, as the Union maintains, Kuebler and Curd lost work opportunities because of their failure to shape regularly and in a timely fashion.

To make this determination I must first decide whether Kuebler and Curd did in fact shape on the dates when their testimony or their records indicated that they had. Since there was no mutually understood method by which confirmation of a person's shaping could be ascertained, verification of that fact from the employer's point of view depended on personal observation by the dispatcher or the steward. But Worhacz and Daley both testified that they did not check the shape trailer every day. They would thus be unable to say with certainty whether or not Kuebler and Curd shaped on any particular

day. Further it is totally illogical that Kuebler and Curd, whose vigor and militancy in pursuit of their contractual and seniority rights is amply documented above in the background to this case, would, all of a sudden in June of 1977, imperil these very rights by discontinuing shaping on a weekly basis. Because of the essentially illogical conclusion which would result from Worhacz's records, and in view of my previous findings on credibility as between Kuebler, Curd and Worhacz, I conclude that Worhacz's records were not accurate in noting whether Kuebler and Curd shaped, and, rather, were intentionally falsified to show that they did not shape when in fact I find that they had.

The motive for this appears in part in the background of this case outlined above. Worhacz admitted his hostility and dislike of Kuebler ostensibly because of the latter's association with Allied, and his

comments to Curd concerning the latter's connections with FORE have already been noted. Then in May of 1977 Kuebler and Curd, as well as Christman, became aware that junior employees were being referred to Mascali. Kuebler asked Worhacz about it and was told that Mascali or Custom, or others, had asked for employees by name and there was nothing he could do about it.[44/]

On July 12, Kuebler and Curd had shaped and were talking to Worhacz in the shape trailer.[45/] They asked Worhacz why Buster Holmes was going over to Mascali on a truck that he owned,[46/] and about another truck which they had heard belonged to Worhacz.[47/] Worhacz replied "I will bury you. You keep hanging out with those rebels, with FORE, you will get yours." Worhacz denied making this statement but I do not credit his denial. Even apart from the background and other circumstances of this case, it is clear,

and I find, that this statement is a clear threat of reprisal against Kuebler and Curd because they were engaging in protected, concerted activity, and constitutest a violation of Section 8(b)(1)(A) of the Act.

Turning back to the question of whether Kuebler and Curd were discriminated against in the spring and summer of 1977, I have now determined that they shaped on the days they claimed they did so, and I have found that an unlawful discriminatory motivation did exist. I have, further, examined the records for each day Kuebler and Curd shaped to determine whether Kuebler and Curd shaped in a timely fashion, that is before the last shape of the day, and, if they did, whether junior employees worked on that day. This determination is made more difficult, first, because I have found these records to be less than honest, reflecting that Worhacz wanted to record,

rather than showing what had actually happened; and, second, the fact that employees who were unassigned and then dispatched in the morning were not generally paid by Willets Point, so that the most complete records, Worhacz personal records, would not show any hours, and would not necessarily show the place to which an employee was dispatched, or whether he was dispatched at all. Therefore, I have had to supplement these records with the testimony of Kuebler and Curd as to who they may have seen working on particular days during this period.

In this connection I have considered only the days when the evidence shows that Kuebler and Curd shaped. My findings and conclusions in respect to those days are as follows:

On April 18 both Kuebler and Curd shaped. There is no indication on that day either from the records or from

testimony that any junior employees worked on that day.

On April 25, Kuebler shaped, and there is again no indication that anyone junior to him worked.

On April 28, Curd shaped at 8:00 a.m.[48/] but the last shape on that day was 7:30 A.M. John Poulos, who was junior to Curd, was referred to Grace. See the discussion on this issue below.

Both Kuebler and Curd shaped on May 2, Again the last shape of the day was 7:30 a.m. However, Buster Holmes drove the Ker-Pau truck that day.[49/]

On May 9, the last shape of the day was at 7:00 a.m. Both Kuebler and Curd shaped.

On May 16, they shaped, but the last shape of the day was 7:30 a.m.

On May 23, they shaped, but again, the last shape was at 7:30 a.m. Curd alone shaped on May 24 and 25, but the

last shape was at 7:30 on those days.

On May 31, Kuebler shaped. The last shape was 8:00 a.m., but there is no evidence that anyone junior to Kuebler went out on that day.

On June 1, Curd shaped, the last shape was at 8, but there is no evidence of junior men working.

On June 6, both men shaped and the last shape was at 8:00 a.m. Paul's copy shows that Konzelmann did not shape, but Worhacz's personal records show that he worked at Edenwald on that day. Kuebler testified that Dennis Nourry, 50/ worked for Coletti, another employer, and Buster Holmes worked for Custom on that day. Kuebler testified further that Nourry was in the shape trailer, got a telephone call from the office, left, and did not return. Kuebler later testified that he saw Nourry that day driving a Coletti truck. Further, Christman testified, credibly, that Worchaz had told him that he, Worhacz, had arranged for Konzelmann to work for Edenwald. In these circumstances, I infer and find that Worhacz in fact referred Nourry to Coletti on

that day, and had referred Konzelmann to Edenwald in a position which would otherwise have been available for a more senior employee. Since Curd had more seniority than Konzelmann this action discriminated against him,[51/] and since Konzelmann did not shape that morning, Kuebler, as the next senior man, would have been entitled to the referral which was given to Nourry, who had no seniority at all. Thus Kuebler, too, was discriminated against on June 6.

On June 7 both Kuebler and Curd shaped and the last shape was at 8:00 a.m.[52/] Again Konzelmann did not shape, as noted on Paul's copy, but he is shown on Worchaz's personal records as working at Edenwald. There is no evidence that any other junior employee worked that day. Thus I find that Curd should have been assigned.

On June 9, Curd shaped again, in the same fact situation as on June 7, Curd

was again the victim of discrimination.

On June 13, both Kuebler and Curd shaped. This situation duplicates the situation of June 6 and I find that both Curd and Kuebler would have worked that day but for the discrimination against them.

On June 20, Kuebler and Curd shaped. Konzelmann again worked for Edenwald, Holmes worked for Ker-Pau, and Kenneth DeVincent, another person not on the list, is shown on Worhacz's personal records as working for Custom. Here, again, if seniority had been followed, Kuebler and Curd would have worked.

On June 27, Kuebler and Curd shaped. Holmes is shown on Paul's copy as not shaping, but is marked as having shaped on Worhacz's personal records. However he did not drive the Ker-Pau truck that day. That truck is shown as assigned to Konzelmann, with DeVincent assigned

to Custom. I find this to be another instance of discrimination against Kuebler and Curd.

On July 5, Kuebler and Curd shaped. However the last shape of the day was 7:30 a.m.

On July 12 Kuebler and Curd shaped. Worhacz's personal records show that Konzelmann did not shape, but was still assigned to Edenwald. DeVincent was assigned to the GCP job for Mascali. Thus, Kuebler and Curd would have worked on that day also.

On July 18 Kuebler shaped. Konzelmann was still at Edenwald, and Holmes at Ker-Pau, but the records for that day show that Christman also shaped and did not work. Christman is senior to Kuebler, so I cannot find that Kuebler lost the day due to discriminatory assignments.

On July 21 Curd shaped. Konzelmann was at Edenwald, DeVincent at Custom,

and Holmes at Ker-Pau. Thus Curd would have worked on that day.

On July 25, Kuebler and Curd shaped. On this day the number 9 driver, Frank Fitzpatrick was on vacation and the shape sheet showed all the drivers senior to Curd posted for that morning. Kuebler and Curd were aware that some rearranging of trucks had taken place, although they were mistaken about the details. They approached Worhacz about the assignments to Mascali, and Worhacz, as he had in May, told them he had nothing to do with those assignments since it was Mascali's job. However Worhacz's personal records show that Konzelmann was still at Edenwald, DeVincent at Custom, Holmes on the Ker-Pau truck, and Joseph Martucci[53/] who had begun shaping Willets Point sometime in the middle of June, was assigned to Mascali. Under the seniority rules and the practice of the shape system both

Kuebler and Curd should have worked on that day.

On August 1, Kuebler and Curd shaped. Konzelmann was at Edenwald, DeVincent at Custom, Holmes at Ker-Pau and Martucci at Mascali. Both Kuebler and Curd should have worked on August 1.

On August 8, Kuebler and Curd shaped. Konzelmann was at Edenwald, Holmes at Ker-Pau and Martucci at Scalamandre, another employer. DeVincent is shown as shaping but he did not work. Kuebler and Curd should have worked.

On August 15 Kuebler and Curd shaped. Christman also shaped and did not work on that day. However, the records show that Konzelmann was at Edenwald, Holmes at Ker-Pau and DeVincent at Custom on a night job. Thus, by operation of the seniority system, Christman, Kuebler and Curd all should have worked on August 15.

On August 22 Kuebler shaped. The

records show that the GCP job was rained out on that day so that Alberti and Hernandez, the two employees regularly assigned to Mascali, and Robert Procida, number 10 on the list did not work. The records also show that Konzelmann, Holmes, DeVincent and Martucci did not work on that day. In the circumstances, I cannot find that Kuebler would have worked on August 22.

On August 25 Curd shaped. Konzelmann did not shape and did not work, but DeVincent was at Custom and Martucci at Mascali. I find that Curd should have worked on that day.

On August 29 and 31 Kuebler and Curd shaped. The incidents which occurred on these days will be described below.

On September 7 and 8 Curd shaped, but the records show that no one junior to him worked on either of those days. I cannot find that Curd would have worked

on these days.

On September 9 Kuebler shaped, but again no junior men worked on that day so that there is no evidence that he should have been assigned.

On September 12 both Kuebler and Curd shaped. The last shape of the day was 7:30 a.m., but the records show that no one junior to Curd worked on that day.

On September 15 Curd shaped, the last shape of the day was at 8:00 a.m., but no junior employees worked.

On September 19, Kuebler shaped. The last shape was at 7:30 a.m., and Martucci was assigned to Scalamandre.

On September 22 and 27 Curd shaped. The last shape of each day was at 8:00 a.m., but no junior employees worked.

On September 26, Kuebler shaped, the last shape of the day was at 8:00 a.m., but no junior employees worked.

On October 3, both men shaped, the

last shape of the day was at 8:00 a.m., but no junior employees worked.

On October 11, both Kuebler and Curd shaped, but the last shape of the day was at 7:30 a.m. Martucci was assigned to a Willets Point truck.

On October 17 both shaped. Again the last shape of the day was at 7:30 a.m. Worhacz's personal records show that Martucci shaped, but did not work. However Paul's copy shows that he was assigned on a Willets Point job.

On October 21 Willets Point sent letters to Kuebler, Curd, Konzelmann, Holmes and Poulos, informing them that they were discharged for refusing to shape on a daily basis.

Leaving aside for the moment the matter of the discharges, I have found a pattern and practice of discrimination going back at least to June 6 where junior employees were referred by Worhacz in a manner

contrary to the usages of the shape system and the practice under the Willets Point seniority list. The Complaint in this case, however, alleges that the Union violated the law only on and after July 25. Therefore my findings and conclusions as to violations of Section 8(b)(1)(A) and (2) of the Act will run from that date, and I find, accordingly, that the Union violated those sections by failing to refer both Kuebler and Curd on July 25, August 1, August 8 and August 15. The Union further violated the law by failing to refer Curd on August 25 and by failing to refer Kuebler on August 22.

There remain to be considered two sets of circumstances, the first of which involves those days when Kuebler or Curd, or both, shaped at 8:00 a.m. and the last shape of the day was prior to that time, as on September 19 and October 11, and the second set of circumstances concerns

those days between July 25 and October 21 when neither Kuebler nor Curd shaped and junior employees worked.

Both of these situations can be considered together as, in my opinion, they are variations on the same theme. I have found that the operation of the shape system required that employees must shape, before the last shape of the day, in order to be eligible for referral. Kuebler and Curd had both worked in this industry and under the shape system for many years, so there is no questions that they were aware of the system's fundamental requirements. However, they were misled, as I have found, by Worhacz's insistence on November 16, 1976 that he had to call Konzelmann on that morning in order to clear the seniority question and allow Kuebler to work. They were misled further when, in May and in July of 1977, Worhacz insisted that he had

nothing to do with the referrals of employees to Mascali when in fact he had total and absolute control over such referrals. Further, there is no credible evidence that Worhacz ever advised Kuebler and Curd to shape earlier, or more often, because of work opportunities.[54] There is no evidence at all that Worhacz advised them of increasing work opportunities in the summer of 1977.[55] This failure to advise Kuebler and Curd is a logical result of Worhacz's expressed hostility toward their complaints, their grievances and their association with the dissidents of FORE. It flows naturally from this that Kuebler and Curd were not referred when they did shape according to the rules and junior men were referred. Likewise it is apparent that they did not shape earlier, or more frequently, not only because they were not advised to do so, but were positively discouraged from

doing so because of Worhacz's verbal deception and the lack of information on the shape sheets concerning the use of non-list employees.

Finally, it follows from all this, and I conclude, that they would not have been referred by Worhacz no matter how early or often they shaped. Shaping in these circumstances would have been entirely futile on their part.

Accordingly, I cannot find that, in this case, and on these facts, Kuebler and Curd were obliged to shape every day, or prior to the last shape of the day, on any day between July 25 and October 21 when men junior to them on the Willets Point seniority list were assigned to work as shown on Paul's copy of the shape records, or on Worhacz's personal records.

In view of these findings and conclusions, I find that the Union, by re-

fusing to refer Kuebler and Curd to work in the period from July 25 to October 21, 1977, violated Section 8(b)(1)(A) and (2) of the Act. Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.), 223 NLRB No. 223 (1976); United Industrial Workers of North America of the Seafarers International Union of North America, AFL-CIO (Sea-Land Service Inc.), 207 NLRB 958 (1973).

C. The August 29 Incident

It is clear that Kuebler and Curd were suspicious through the spring and summer of 1977 that something was going on at Willets Point. They were aware that the Ker-Pau and TWT trucks were being used. They observed employees junior to them driving trucks belonging to other employers such as Custom, Coletti and Melita.[56/] They were aware, also, that two Willets Point drivers, Alberti and

Hernandez were more or less permanently assigned to Mascali throughout this period. While they may indeed have been naive, they were put off the track and misled by Worhacz until the morning of August 29.

On that morning Kuebler was sitting in his car on the street which borders the adjoining properties of Willets Point and Allied. He had arrived early and was reading his newspaper when he observed Worhacz driving in to Willets Point at about 7:20 a.m. Next he saw Martucci driving out of the Willets Point yard at 7:28 a.m. driving a Willets Point truck. Curd arrived about 7:40 or 7:45 and the two of them went into the shape trailer. There they observed the fact that men were posted for 8:00 a.m. They then left and went to the Willet Point job site where they observed Martucci working. Curd spoke to him about his

assignment and Martucci replied that he didn't make the rules.

At this point, Curd contact Business Agent Mike Carbone.[57/] Carbone agreed to come down to discuss Curd's grievance on August 31. Because of his lack of familiarity with the industry, Carbone asked McFarland, who was at home recuperating from an operation, to join him. McFarland agreed.

Meanwhile, on August 30, Worhacz heard of some work, possibly two weeks, with an employer named Delman. He called Curd's home three times on that evening in order to offer him the opportunity to work. Curd was not home and did not return the calls.

On the morning of the 31st, Curd arrived at about 7:00 a.m. Worhacz came out of the office to where Curd was sitting in his car and asked why he had not returned the telephone calls the night before.

Curd replied that he had come home too late, and, besides, he wanted to present his grievance to the Business Agent. Worhacz then said that Curd would rather fight him for a day's pay than work for two weeks. Curd asked Worhacz for the address and said he would go to the job the next day. He also asked Worhacz whey he hadn't called him all summer. Worhacz replied to this by saying that Curd would never get any work from him, that he would hurt him in his pocket. He began screaming at Curd, saying he would "b ry him, and that he was working, 58/ and that Curd would never work.

Carbone and McFarland arrived at 8:05 a.m. on the 31st. McFarland had recently undergone surgery on his legs and was unable to get out of the car, so that the discussions took place beside the car. Curd had asked Kuebler and Lawrence Kudla, the Recording Secretary of FORE, to join

him.

Curd presented his grievance to the Business Agent, alleging that he had shaped on time for the 8 o'clock shape posed on the shape sheet; that Martucci had been sent out at 7:25 on a truck; and that the truck should have been held until 8:00 and assigned to Curd by seniority. Worhacz, however, maintained that the last shape of that day was at 7:30. He went in and got the shape sheet from the shape trailer, but McFarland declined to look at it. Instead, he accepted Worhacz's explanation and told Curd that since he was late for the last shape of the day he was not entitled to the day's pay and his grievance was denied.

Curd then raised a question about the assignment of Alberti and Hernandez on a permanent basis to the GCP job for Mascali. He maintained that they were not shaping at Willets Point; that they

had thereby forfeited their seniority; and that they should be removed from the Willets Point seniority list. McFarland declined to do this, but did instruct Worhacz to order Alberti and Hernandez to shape in accordance with their place on the Willets Point list.

Kuebler then raised another matter. He claimed he was being blacklisted by Custom because Barkley, the owner of Custom had referred to him as a trouble-maker. Carbone suggested that they go over and confront Barkley, but McFarland told Kuebler that if Barkley was discriminating against him, Kuebler should "go to American Civil Liberties." Kuebler then left.

Curd was not satisfied with the adverse decision on his grievance and appealed the matter to the Executive Board of Local 282. The Board met on December 1 to consider this appeal.[59/]

At the December 1 meeting, Kuebler and Curd were accompanied by Kudla and Katsaros. The Board members present were Secretary-Treasurer Sasso, Argento, Baggia, Bai, Carbone and McFarland. Sasso, who presided, opened the meeting by announcing that the Board would not consider any matters which were before the National Labor Relations Board.[60/] Thereupon Worhacz asked what Kuebler be excluded from the meeting because he had filed charges with the National Labor Relations Board. This Sasso declined to do and the meeting continued.

Curd presented his grievance, but on the basis of the shape sheet produced by Worhacz showing that the last shape of the day was 7:30 a.m., the grievance was denied. The Executive Board disregarded statements by Kuebler and Curd that this shape sheet had been altered, and that they had seen a shape sheet in the shape

trailer on the morning of August 29 61/ showing an 8 o'clock start. There was some additional discussion about Alberti and Hernandez and the Mascali arrangement, but the meeting ended without a resolution on his grievance which was satisfactory to Curd.

It is evident that the key to this incident is in whatever actions were taken by Worhacz on the morning of August 29.

As background, it may be noted that from May 23 until August 29, William Alberti was posted for the GCP job at 8:00 a.m. and Manuel Hernandez was posted for the same time on the same job from June 13 to August 29. On those days when Christman or some other drivers was posted for Mascali up to August 29 the time was invariably 8:00 a.m. Worhacz testified that Mascali's job superintendent, Paternostro, frequently changed the starting time for those employees

assigned to the GCP job, but there is no indication in the records that this 8:00 a.m. schedule varied during the summer. After August 31, when McFarland ordered Alberti and Hernandez off the Mascali job and back to Willets Point, the records continue to show an 8 o'clock posting for the GCP job until September 12, when the time moved back to 7:30 for a week. Thenceforward the starting time varied between 7:30 and 8:00.62/

Worhacz testified that the shape sheet, and its duplicate, Pual's copy, were made out at around 4:00 p.m. on the afternoon of August 26 for Monday the 29th, showing Alberti, Hernandez and Christman posted for 8:00 a.m. at Mascali's job. He then stated that Paternostro called about 4:30 on the 26th and changed the starting time to 7:30. Worhacz went out and changed the times on the shape sheet,63/ but neglected to do

so on Paul's copy, which is retained in the dispatch office. Thus Paul's copy for August 29, which is in evidence, shows a starting time of 8 o'clock for the three drivers assigned to the GCP job. Worhacz explained this inconsistency by claiming a mere lapse of memory. However, Worhacz's personal records which as described by Richard Moore, are prepared from the shape sheets which are made up at the beginning of the day, and the hours worked, which are taken from the employees' time cards at the end of the day, show that Alberti, Hernandez and Christman worked at GCP from 8:00 a.m. to 4:30 p.m. on August 29.

Now it is true that Alberti and Hernandez were not paid by Willets Point during this time. They did not return to the Willets Point payroll until after McFarland's order to bring them back on August 31. They did not reappeal on

Willets Point's payroll until September 4. To show the hours worked, and to attempt to reconcile this inconsistency in Worhacz's story and his records, the Union called Mascali's timekeeper on the GCP job, Al King, to try to ascertain through Mascali's time records what hours the three Willets Point employees worked at the GCP job on August 29. King testified, credibly, that the records showed that Hernandez and Christman had worked 8½ hours on August 29. But only in Hernandez's case had his foreman put down the hours, 7:30 to 4:30. In Christman's case the records did not reveal whether he started at 7:30 and worked until 4:30 for his 8½ hours total, or whether he started at 8:00 and worked until 5:00, or worked through his lunch hour, thereby picking up the half hour of overtime. However, even assuming that Christman had a 7:30 start, there is still Alberti's

case to consider. In his situation every record, except for the shape sheet, agrees that he worked 8 hours, from 8:00 to 4:30 on that day.

The weight of this evidence, taking Alberti's situation; the testimony of Kuebler and Curd that they saw a shape sheet in the shape trailer on August 29 with 8 o'clock starts posted; the fact that both Paul's copy and Worhacz's personal records show 8 o'clock starts; and the fact that the shape sheet itself, the physical document, shows that no earsures or changes were made in the starting times for Alberti, Hernandez and Christman for August 29, convinces me that Worhacz lied about changing the starting times; and that while there may have been changes in the starting times of Hernandez and Christman, there was none in Alberti's starting time. It follows then that Worhacz, sometime after

the shape in the morning, took down the shape sheet and wrote a new one showing 7:30 starts for all three employees.[64/] By August 31 the new document was available for McFarland's inspection, and was used at the Executive Board hearing on December 1,[65/] then introduced into the record in this case. By September 1, when Curd took a picture of it, the substituted sheet had three more days of entries on it.

In these circumstances I view Worhacz's calls to Curd on the evening of the 30th with an offer of work to be merely a ploy, to get Curd off the premises when the Business Agents arrived, even though he had covered his tracks with the substitute shape sheet. His suggestion to Curd on the morning of the 31st that he, Worhacz, could just as well present the grievance to the Business Agents must be based on his assumption that Curd was even more naive than I have found him to be.

Thus I find an additional violation of Section 8(b)(1)(A) in Worhacz's threats to Curd on the morning of August 31, and a further violation of 8(b)(1)(A) and (2) in the assignment of Martucci out of seniority, and the falsification of the shape records to insure the denial of Curd's grievance after he became aware of and threatened to expose Worhacz's duplicity to the Union's Business Agents.

D. The Discharges of Kuebler and Curd

On October 21, Willets Point, by Pual Tully, Superintendent, Maintenance Division, addressed letters to Kuebler and Curd (also to Poulos, Konzelmann and Holmes) pointing out that "A review of the Company records" showed that they had been consistently absent and stating further that "These absences were caused in large measure by your failure to physically shape your job each day."

They were notified that they were discharged as of that date.

Worhacz testified that Tully's interest in the shape records was prompted by the incidents of August 29 and 31, and that, following the meeting between the Business Agents and the employees, Tully became upset and began checking through the shape records. As I have already found, the only shape records which existed were those which had been prepared by Worhacz himself. I have found, further, that these records intentionally misstated the number and frequency of shapes by Kuebler and Curd, in part to deny them referrals to work, but another reason may have been just eventuality. I have also found that despite anything McFarland may have said about once a week shaping, Worhacz continued the practice, concealing the practice, by his own admission, both from McFarland

and the Company. When Tully went through the records he could reach only one conclusion, that these men were not shaping, but such conclusion was based on a calculated and deliberate fraud.

Worhacz testified that he had a conversation with Tully before the discharge when the latter told him that the men were not shaping even though there was work available. Worhacz replied that he had no argument for that, and the discharge letters were sent.

Following their discharges Kuebler and Curd filed charges with the National Labor Relations Board against Willets Point, Kuebler on October 27 and Curd on November 11 (Case Nos. 29-CA-6011 and 6011-2). Following investigation the charges were dismissed by the Regional Director for the discharge was based upon the Employer's reliance on shape records maintained by the Union that in-

dicated you have failed to physically shape for a sustained period of time.

> "Inasmuch as there was insufficient evidence to establish that the Employer had reason to doubt the validity of the shape records submitted to it by the Union, I am refusing to issue a complaint against the Employer."

The dismissal letters were dated December 30, 1977, the same day that the Complaint issued in this case.

Kuebler received his copy of the discharge letter on Saturday, October 22. On Monday the 24th he went to Willets Point and spoke to Worhacz about it. Worhacz said he hadn't yet received the letter but he would get back to Kuebler. He did not, so on the 26th Kuebler called Business Agent Carbone.[66/] Carbone told him that the shape records indicated that he hadn't been shaping, but he would look into it. On the 27th Kuebler filed his charge with the Board. Later, not having heard from Carbone, Kuebler called

him again. Carbone told him that since he had taken the case to the NLRB, to let them handle it.

Curd apparently did not contact Worhacz about his discharge, but did call Carbone, with substantially the same results as Kuebler had obtained. Curd, however, said that he had his own records, to which Carbone replied that he hadn't known that. As the result of these conversations Curd arranged to bring his records down to the Union's offices on November 10.

Kuebler and Curd met with Carbone at the Union's offices on the 10th.[67/] Carbone at first asked them to wait for McFarland, then when he arrived suggested that they all go to Sasso's office. When they got there they found Sasso, together with Union officials Gesualdi and Dee.

Sasso testified that he told Kuebler and Curd that the Union would not get

involved in this matter since there were charges before the Board. He told them that this was his final word, on advise of counsel,[68/] and that this was a long-standing procedure. He added that Carbone had gone down to Willets Point and had checked the employer's records and the shop steward's records. As a result, there was no basis for arbitration. They refused to look at Curd's records and the meeting concluded.

On the basis of the facts I have previously found, the one day a week shape was still in effect in October; Kuebler and Curd had satisfied their obligations to shape once a week through October 21; the employer Willets Point had delegated total responsibility for the maintenance of shape records to the Union's shop steward; and those records, through deliberate falsification and manipulation, showed that Kuebler and

Curd had not shaped. Thus I find and conclude that the discharges of Kuebler and Curd were caused by the Union as a further manifestation of the discriminatory scheme devised and implemented by Worhacz in retaliation to the protected concerted activity of Kuebler and Curd in violation of Section 8(b)(1)(A) and (2) of the Act. Miranda Fuel Company, Inc., 140 NLRB 181 (1962).

In addition, the Union violated Section 8(b)(1)(A) by Worhacz's threats to Curd on the morning of August 31 that he would "bury" Curd and that Curd would never work.

Further, the Union violated Section 8(b)(1)(A) by its admitted refusal to process the grievances of Kuebler and Curd from October 24 on because they had filed charges with the National Labor Relations Board. N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America,

391 U.S. 418 (1968)

E. Kuebler and Mascali

The specifications for the Grand Central Parkway project required bidders to certify that they adopted certain minimum goals and timetables designed to increase minority manpower utilization, and affirmative action programs directed to that end. "Minorities" are defined in the specifications as "Negroes, Spanish Surnamed Americans, Orientals and American Indians". Specific percentages for such minority employment are listed in the specifications. Mascali, as the successful bidder on this project, had been experiencing difficulties in meeting these quotas.[69/]

As one result of these problems, Robert Agnew, the night superintendent of the GCP job, who was Black,[70/] spoke to Frank Daves, a Black owner-operator of a truck employed on the job at night, in

mid-August, asking Daves if he knew of a minority driver for a couple of days fill-in. He also mentioned to Daves that the job might last 5 or 6 months. Daves replied that he had a friend who needed work.

The matter rested there until the afternoon of September 1. At that time Agnew had a conversation with Joseph Paternostro, the day superintendent, in which Paternostro said that he needed a driver.[71] Agnew recalled his prior talk with Daves, and said to Paternostro that he might be able to get someone for him. Agnew then called Daves. Daves apparently checked with his friend, found he was already working, then called Ed Savera,[72] the shop steward at a company called Hendrickson Brothers. Savera had no minority driver available, but it so happened that Curd and Kuebler had been shaping off and on at Hendrickson Brothers

that summer, and occasionally working. Savera thus gave Daves their names and telephone numbers. Davis called Curd, who was not at home, then called Kuebler, who was home and who expressed an interest in working. Daves called Agnew and gave him Kuebler's name and number. Agnew then called Kuebler and arranged for him to report to the GCP job on the morning of September 2. Agnew completed the circle by informing Paternostro that Kuebler was coming in the next morning.

There is some confusion in the testimony as to how long Kuebler's job was going to last. It is clear from the testimony of Kuebler and Daves, which I find to be credible, that Daves paraphrased Agnew's remark that the job would last four or five months or that it would last until the end of the season. 73/

Kuebler reported to work at Mascali on September 2 and greeted Paternostro

as he came in. Paternostro knew Kuebler because he had been a superintendent for Willets Point for some years and was only on loan to Mascali for the duration of the GCP job. Kuebler filled out the required forms and went to work.

At the end of the day Kuebler came in to the office and asked about the situation for the next working day, Tuesday, September 6. Paternostro testified that he told Kuebler that he had to check with Steve Costa to see whether Mascali's own drivers were available, or whether there might be a surplus of Mascali drivers. He said that Costa would know. Kuebler, on the other hand, testified that he arrived back in the office about 4:30 p.m. He further testified that he asked Paternostro what time he should report on Tuesday, and that Paternostro replied that he would call him if the starting time was before 8:00 a.m. If

not, Paternostro said, "I'll see you Tuesday."

I credit Kuebler's version of this incident, first because I found Paternostro to be rather sly and evasive, wishing to avoid trouble from any direction, and, second, because of the timing of the conversation. By 4:30 in the afternoon, Paternostro, by his own testimony, would already have called Costa, and, indeed, would already have called Worhacz to arrange for the next work day's drivers. Thus Paternostro's alleged statement to Kuebler that he had to call Costa is obviously untrue. He also testified that he spoke to Worhacz on September 2, at one point in his testimony saying that he told Worhacz that Kuebler was on the job, at another point saying that Worhacz had remarked to him that Kuebler was on the GCP job. Worhacz testified that Paternostro mentioned on

the 2nd that Kuebler was on the job. Worhacz further said that he told Paternostro that Kuebler would have been at Mascali anyway if he had shaped at Willets Point, and, further, that he had enough drivers to send Paternostro on Tuesday, and that Kuebler would shape in his regular position on the Willets Point list on Tuesday.

I find that this conversation took place, probably pretty much as described by Worhacz, although logically I could infer that Worhacz's end of the conversation was more forceful and positive with respect to Kuebler's obligations to Willets Point. But, from my observations of Paternostro, this gentle admonition would have been sufficient to remind Paternostro that he was obliged to obtain employees through Worhacz at Willets Point, and not through the individual initiative of Kuebler or anyone else. I cannot specu-

late as to why Paternostro did not inform Kuebler of the hiring arrangement Mascali had with the Union, or the results of his telephone call with Worhacz on that Friday afternoon. The only reason which has any logic is that Paternostro may have thought that Worhacz would speak to Kuebler at the shape on the morning of the 6th, and Paternostro could avoid a troublesome confrontation.

On the morning of the 6th, however, Kuebler appeared at the GCP job office. Both Kuebler and Paternostro agree that the letter said that he could not put Kuebler to work because he had to obtain his drivers from Worhacz at Willets Point. When Kuebler protested, Paternostro said there was nothing he could do.

On September 7 Kuebler spoke to McFarland on the telephone cand told him what had happened. McFarland replied that he had made the arrangement whereby if

Mascali needed men, they would get them from Willets Point. On that same day Kuebler went to see Charles Mascali who then called Worhacz at Willets Point and was informed that Kuebler was on their list, and that he was lower in seniority than the people who had been sent to the GCP job.[74/] Worhacz must have mentioned something to Charles Mascali about Kuebler jeopardizing his seniority at Willets Point by shaping and working at the GCP job, because this was mentioned at Kuebler at one of their later meetings by Charles Mascali.

They did have several more meetings but those meetings produced no results satisfactory to Kuebler and produced no change in the situation.

On September 12 Kuebler met Daves and told him what had happened to him at Mascali. Daves said he would see Agnew and find out. A few days later Daves met

Kuebler and told him that Agnew had said Kuebler was a troublemaker and they had to get rid of him. Agnew agreed that he had talked to Daves about Kuebler, but asserted that he told Daves that Kuebler was going to put in a claim against Mascali and that he, Agnew, wasn't looking for any trouble because of the claim. He said that he had done someone a favor and it was now causing him trouble. I credit Agnew and find that, in all probability, either Daves or Kuebler got the remarks mixed up in the transmission.

There is really no indication that Kuebler was discharged by Mascali because he was considered a troublemaker or agitator. Rather the record shows that he was hired on September 2 at the end of a curious and highly fortuitous chain of events which led up to his employment. All of these oddly assorted circumstances would not have coalesced in the hiring

of Kuebler if it were not for the fact that the arrnagement between Mascali and Worhacz broke down on September 1 and Worhacz was not able to promise Mascali the man it needed for the next day.

There is another circumstances, however, which also may have influenced Mascali in the hiring of Kuebler. This is the fact that both Charles MAscali and Paternostro were concerned about the unfamiliarity of some of the drivers supplied by Worhacz with the geography of the GCP project. The job was some 11 miles from one end to the other. Paternostro had complained to Worhacz about sending people over who were unfamiliar with the job, pointing out to him that in those cases Mascali had to assign a laborer to act as a guide to the driver until he learned the various locations on the job. The General

Counsel asserts that the removal of Alberti and Hernandez from Mascali by McFarland on August 31 made this problem more acute. He may be right, but I feel that Mascali's unhappiness with unfamiliar employees existed before the removal of Alberti and Hernandez, undoubtedly prompted Mascali to look for a minority employee on a permanent basis to help them with their minority quota problem, as well as the job familiarity issue. Mascali would encounter no problems with the Union under the arrnagement with McFarland because it was understood that Mascali's own employees took precedence on the GCP job, and then the arrangement would go into effect.

In view of these facts, and from the conversation between Agnew and Daves in mid-August, and between Paternostro and Agnew on September 1, I find that

it was Mascali's intention to hire a permanent minority employee for the length of time needed to complete the GCP project. Although he was unable to locate a minority, Agnew went ahead anyway and hired Kuebler on the evening of September 1. Paternostro acquiesced in this on that same evening, even though he apparently was under the impression that the person being hired was not the same Kuebler he had known in his years at Willets Point. This last misunderstanding was, of course, removed when Kuebler walked in the next morning, but Paternostro raised no questions with him at that time. He raised no questions in the evening either, but by that time, as I have found, Paternostro had been made aware of Worchaz's views on where Kuebler was going to be on Tuesday morning. Paternostro was then in the position

of having an employee who was also on the Willets Point list. At that point he could be accused by the Union of violating the arrangement Mascali had made with it. If Kuebler had been a member of a minority group, or if he had been anyone else but an employee on the Willets Point list, there is no question but that he would have continued to work.

There is no evidence that Paternostro consulted with anyone else after his conversation with Worchaz, but I infer and find that sometime after that conversation he determined to terminate Kuebler.

The arrangement between Mascali and Local 282 bears some resemblance to the kind of hiring arrangement considered in Local 357, I.B.T. et al v. N.L.R.B., 365 U.S. 667 (1961) or in Miranda Fuel Company, Inc., supra, but

there are significant differences. The arrangement was not an exclusive hiring hall. Mascali was free to hire and place its own employees on the job, and free to hire owner-operators, and trucks and drivers from other employers.[75/] But the arrangement did require that when Mascali needed flat truck, or ten wheel dump truck, drivers, it was required to obtain them first from Worhacz. I find, then, that the arrangement is not an exclusive hiring arrangement since it covers and affects only a small percentage of Mascali's work on the GCP job, and only a minor proportion of the work assigned to Willets Point employees. The arrangement itself is not unlawful in these circumstances, and may well have had a beneficial effect in providing work for Willets Point employees and others as asserted by McFarland. The agree-

ment by Mascali to the arrangement would not then constitute a violation of Section 8(a)(1) and (2) of the Act.

However, the General Counsel maintains that Mascali knew, or should have known, of the discrimination which was taking place at Willets Point against Kuebler and Curd.[76/] There is no evidence in this record to show that Mascali, or any official or supervisor of the companies which make up Mascali ever had actual knowledge of any discriminatory practices at Willets Point, until Kuebler was terminated on September 2 and then mentioned his problems there to Charles Mascali sometime later in September. Even then, a review of Kuebler's testimony shows that he had only a limited view of the discrimination which I have found to exist at Willets Point during the late spring and summer. Thus I find no actual know-

ledge of any discriminatory practices at Willets Point, until Kuebler was terminated on September 2 and then mentioned his problems there to Charles Mascali sometime later in September. Even then, a review of Kuebler's testimony shows that he had only a limited view of the discrimination which I have found to exist at Willets Point during the late spring and summer. Thus I find no actual knowledge by Mascali of any discriminatory misuse of the arrangement by the Union.

Whether Mascali should have known about the discrimination is a rather complicated question. The person in charge of implementing the arrangement at Mascali was Paternostro, a former long-time employee of Willets Point. However, Paternostro was a supervisory employee, in charge of projects, and he testified that he was familiar with

individual drivers, but was not aware of their relative positions on the seniority list. In addition, a further review of assignments as shown on the Willets Point shape records shows that assignments to the GCP job, with the exception of the semi-permanent status of Alberti and Hernandez, were scattered throughout the list, with high seniority and low seniority people assigned to GCP from time to time. This is due to the fact that the first obligation of the employees was to their own employer, Willets Point, and the fact of assignment first to senior employees of the jobs carrying the most overtime, with a right of refusal and consequent reassignment. Thus Paternostro, even if he were familiar with the Willets Point seniority list, could not detect any discrimination by the appearance of low-seniority employees at the CGP

jobsite. To be sure, he had not seen Kuebler or Curd before September 2, but there is no evidence that he was aware that they were not assigned to a Willets Point job, or some other job, or were not assigned at all.

This situation changed with the hiring of Kuebler on September 2. Certainly his conversation with Worchaz on that date should have alerted Paternostro to the fact that something was amiss in the referral system at Willets Point. If this incident did not warn Mascali, then Kuebler's conversations with Charles Mascali on September 7 and subsequently should have done so. But there is no evidence that anyone from Mascali inquired any further into the operation of the system beyond the single telephone call made by Charles Mascali to Worhacz. Mascali continued to honor the arrangement,

presumably, down to the conclusion of the GCP project. I therefore find that Mascali should have known, or make inquiries about, the discriminatory manipulation of the referral system and the shape system at Willets Point on and after September 2, 1977.

Having pointed out some of the similarities and distinctions between the underlying facts here, and those in Miranda Fuel, supra, I note also that while Mascali Construction is signatory to the same agreements with Local 282 as Willets Point, and McFarland's uncontradicted testimony shows that the separate corporation set up to perform the GCP contract signed these agreements. However the arrangement under discussion here, while it certainly is a collective bargaining agreement, does not impose the whole panoply of rights and obligations which customarily accompany such a

relationship. The arrangement called for the supply of labor called for on a daily basis in the light of daily needs. The employees who were referred to Mascali, while they were under the direction and control, and were in some instances paid directly by Mascali, yet remained employees of Willets Point, with their rights and obligations determined by their position on the Willets Point seniority list. With the exception of Alberti and Hernandez, who were more regularly assigned by their own choice as well as for Mascali's convenience, the referrals, even when not made on a discriminatory basis, were not strictly in accordance with seniority.

Thus, although Mascali delegated and surrendered this aspect of its authority over hiring employees to the Union, and although the Union, as I have found, exercised this authority in an egregious-

ly discriminatory fashion, I cannot find in these circumstances that Mascali must be held jointly responsible for the unlawful manner of the exercise of the Union's delegated authority during the period from May until September of 1977. I therefore find that the Union, through its discriminatory administration of the arrangement with Mascali, which discrimination had a foreseeable effect of encouraging union membership,[77/] and has been found to be in retaliation against the protected, concerted activity of Kuebler and Curd, violated Section 9(b)(1)(A) and (2) of the Act; and that by continuing to honor the arrangement with the Union on and after September 2, 1977, Mascali accepted and condoned the unlawful activities of the Union, thereby violating Section 8(a)(1) and (3) of the Act. Miranda Fuel Company, Inc., supra.

Further, by effecting the discharge of Kuebler on September 2, 1977 for reasons not connected with the legitimate operation of its arrangement with Mascali, but in furtherance of its discriminatory pattern of conduct against him, the Union has further violated Section 8(b)(1)(A) and (2) of the Act. By acquiescing in this discriminatory act through the abandonment to the Union of its control over the hiring and retention of its own employee, Kuebler, Mascali has further violated Section 8(A)(1) and (3) of the Act.

F. The Allied Connection

Coming finally to the events which constitute the basis for that part of the Consolidated Complaint arising out of the charge in Case No. 29-CB-3235 the facts show that Allied Used Truck Exchange, Inc. is Willets Point's next door neighbor. Its Secretary-Treasurer, Harold

Horowitz testified[78/] that Allied's business is the buying and selling of heavy trucks. It obtains the trucks from a number of sources in the United States, and resells them either to other places in this country, or ships them to buyers overseas. Allied is responsible for the transportation of the trucks it buys, and, in the case of sales, the transportation may be handled by the buyer's own employees, by contract carriers, by Allied's employees,[79/] or by what Horowitz referred to as "itinerant" drivers, all at the option and expense of the buyer. The transportation of the vehicles to their destination is a part of the selling price.

Over the years, the people employed at Willets Point had observed the movement of trucks into and out of the Allied yard. Accordingly, early in 1976 after five Willets Point trucks had been

sold in December of 1975, Worhacz thought there might be some work opportunities for Willets Point drivers idled by the sale of the trucks. He thereupon went over to see Horowitz, and asked him if he needed drivers. Horowitz expressed some concern over signing a contract with the Union, but Worhacz indicated that concessions could be arranged on hours and other matters which might be burdensome for Allied. He furnished Horowitz with copies of the Union contracts and then left for vacation in Florida.

While Worhacz was away Richard Moore, then the dispatcher at Willets Point, received a call from Horowitz asking if any drivers were available. Moore passed this request on to the drivers and, to his knowledge some went over to Allied.

One of the Willets Point drivers who

had been contacted by Moore and went to Allied was William Alberti.[80/] Alberti testified that one day during the summer of 1976 he was posted but did not go out. He then went next door to Allied and saw a shop foreman named John. He was assigned to drive a truck down to a pier in Brooklyn. After delivering the truck he returned to Allied where he was paid, in cash, with no deductions for taxes, social security, health and welfare or anything, by Horowitz. Later he recalled an assignment to Brewster, New York, about 20 miles from New York City, where Allied had bought 20 trucks. He was accompanied on this trip by Kuebler, Curd, Curd's father and Katsaros. This required 2 or 3 trips with Kuebler or Curd, but did make several trips with Poulos, and one trip with Poulos and Lawrence Kudla.

When Worhacz returned from vacation[81/]

he went back to see Horowitz, but the latter was unreceptive to the idea of signing a contract with Local 282. Worhacz threatened him with "problems," but apparently had no further contact with Horowitz or Allied, although he testified that he was in the Allied yeard once or twice to borrow equipment. Worhacz returned to Willets Point and found out who the drivers were who had been driving for Allied. These were Alberti, Hernandez, Poulos, Kuebler and Curd. Worhacz then testified that he told "everybody" not to go "over there" (to Allied) because he felt by denying Horowitz access to drivers he could put pressure on him to sign the contract. Both Alberti and Hernandez testified that Worhacz had told them not to go over to Allied any more, but there is no evidence, other than Worhacz's general statement, that he told Kuebler or Curd

the same thing. Kenneth DeVincent, who also had worked at Allied and who told Worhacz that he had, denied that Worhacz had told him not to go to Allied. I find that Kuebler and Curd were not told to stop going to Allied in 1976 and I do not credit Worhacz's statement that he had told everyone not to go there.

Kuebler and Curd testified that they knew and were friendly with some of the employees at Allied and from time to time they stopped by the Allied property after shaping at Willets Point to have coffee with those employees. Whether this familiarity grew out of their working for Allied or whether the social aspect came first is not clear. Kuebler, whose testimony I found general open, candid and credible, was distinctly evasive in respect to his connections with Allied. He testified that he had never worked for Allied, nor had he ever driven equip-

ment on the Allied property, but this is contradicted by Alberti, whose testimony I credit, as well as Worhacz, Fitzpatrick and Nicolai, whose testimony I do not credit. It is illogical to suppose, as Kuebler would have me, that each time he picked up or delivered a truck for Allied, he left or picked up that truck in the street in front of Allied's yeard, rather than on the premises. Then, too, Kuebler's story that, except on one occasion, he was paid directly by Allied's customers is in conflict with the logical and credible testimony of Horowitz that he, personally, had to approve all arrangements for itinerant drivers, and that he personally handled all the financial transactions between customers and drivers.[82/] Kuebler's assertion that he drive for customers of Allied 5 or 6 times between January of 1976 and July

1 of 1977 is also doubtful, although I do not credit the general and sweeping statements by Nicolai and Fitzpatrick concerning the number of times they saw Kuebler, (and Curd) working in and around Allied. In particular I discredit the testimony of Worhacz that Kuelber was at Allied 3 or 4 days a week during 1976 and 1977, and I discredit Worhacz's personal records which list Kuebler at "Allied" or sometimes at "Allied" on many occasions from June to October 1977. Even though the originals of those records are not in evidence, the copies reveal that references to Allied were sometimes interpolated at a different time and in a different hand than originally made. This attempt at overkill shows, first, that Worhacz's alleged anger at Kuebler's working for Allied at a time when the Union was pushing for organization and when the

unemployment fund was down from 26 weeks to 4, was a sham and a fraud; and, second, reveals that Worhacz's real reason for indicting Kuebler (as well as Curd) for his employment at Allied was in furtherance of his scheme to punish them for their complaints and their association with FORE.

However, despite this, I think the record shows that Kuebler worked more often than he said. William Alberti, whose testimony I do not credit, stated that he had seen Kuebler driving trucks in or out of Allied 5 or 6 times in 1976 and 3 or 4 times in 1977. Alberti, of course, was working through most of this time but he testified that he came back to Willets Point 3 or 4 times a day to pick up equipment. Thus his ability to observe Kuebler at Allied was fairly good. I can really make no inference based on these facts, except to guess

that the total number would have been somewhat more than the number seen by Alberti. There is not as much testimony concerning Curd's working at Allied, but, based on the same reasoning, I find that Curd was there about half the times that Kuebler worked at Allied. This is quite different from the reports by Worhacz, Nicolai and Fitzpatrick.

On July 27, Kuebler and Curd had arranged to deliver trucks from Allied to a destination in Miami, Florida. Kuebler had called Katsaros and Lawrence Kudla on this job, and all four met in front of Allied sometime after noon on that day. Kudla was the first to get going, and he pulled up a couple blocks away to wait for the others. While he was there, Worhacz drive by in a pick-up truck. Worhacz stopped and passed the time of day with Kudla, then drove off in the direction of Allied and Willets

Point.

Worhacz testified that he had stopped and talked to Kudla and had found out that the four men were taking the trucks to Florida. He then saw Curd, Katsaros and Kuebler at Allied and offered them pledge cards to assist him in organizing Allied. They all told him they were just trying to make some money. He returned to where Kudla was wiating and offered him a card. Kudla just stood there and looked at the card, so Worhacz gave up in disgust and left. Kuebler, Katsaros, Kudla and Curd denied that this incident ever took place. I credit these denials. Worhacz's testimony is uncorroborated, and in view of my findings on his credibility I cannot rely on his unsupported word with respect to material issues in this case. I infer and find that he fabricated this story to support his version of the incident on

November 22, when he did offer pledge cards to these employees.

Katsaros testified that he went on the Florida trip but did not see Worhacz on that day. He was not asked whether he had worked for Allied before that time, although Alberti identified him as being on the Brewster, New York, trip. He did work at a number of other places during the summer. Worhacz's statement that Katsaros had worked at Allied beginning in the winter months of 1977, and saw him on Allied vehicles ten times after July is preposterous and totally incredible.[83/]

All of the four employees denied that they had driven for Allied after the Florida trip at the end of July, except for Curd, who took a truck to Ohio sometime between July 28 and August 16.

Then, on November 22, Kuebler,

Katsaros, Lawrence Kudla and his father, Walter Kudla met on the street in front of Allied's property.[84/] They then got into Lawrence Kudla's car and went off to various job locations to organize and campaign for FORE. They returned about 4:00 p.m., [85/] got out of Kudla's car and were preparing to leave when Worhacz came out of Willets Point and approached the group.[86/] He spoke first to Kuebler, telling him that he wanted to organize Allied and asked Kuebler to sign a pledge card. Kuebler reminded Worhacz of a previous organizing effort they both had participated in, which fell through, according to Kuebler, due to Worhacz's mishandling. As a result, Kuebler said that had been enough, and that Allied was not his employer. He refused to sign the card. Worhacz then approached Katsaros, and told him about the organizational campaign. Katsaros

replied that he hadn't worked for Allied, and therefore couldn't sign a pledge card listing Allied because that would be a false statement. Worhacz told him just to sign the card and let it go at that. Katsaros then asked Worhacz if he had contacted the Business Agent on this, and on receiving a negative reply, asked Worhacz to have Mike Carbone contact himself or Kuebler. Worhacz finally asked him to sign and they would iron it out later.

Worhacz's version of the incident begins with his assertion that Kuebler, Katsaros and the Kudlas were seen driving trucks up to Allied. Both he and the dispatcher, Frank Daley, allege that Kuebler had license plates in his hand which he had taken off the trucks. Worhacz's version of the conversations with Kuebler and Katsaros is substantially in accord with theirs. Alfred Nicolai,

who testified for the Union, merely stated in conclusionary terms, that Worhacz gave them pledge cards and they refused to sign them.

I find and conclude that the credible evidence shows that Kuebler worked at Allied a number of times during 1977. Curd worked there fewer times and Katsaros and Kudla fewer still. I find, further, that their employment at Allied, as well at the employment there in 1976 of Alberti and DeVincent, was of a sporadic and casual nature, as needed by Allied, and on a call-in basis. 87/ They were paid on a cash basis with no deductions for anything. I find that Worhacz did try to persuade Horowitz to sign a contract early in 1976, with a view to providing additional work for Willets Point drivers at Allied, and I find that he knew of the financial arrangements at Allied through his discussions

with Alberti and Horowitz. I find that Worhacz warned Alberti and Hernandez not to work at Allied because of those financial arrangements which were not compatible with union wages and working conditions, but he did not so warn Kuebler and Curd. Instead he exaggerated the numbers of times he saw them working at Allied, taking care after June of 1977 to enter these occasions in his personal records.

G. The Union Discipline

After the November 22 incident, Worhacz brought charges before Local 282 against Curd, Kuebler, Katsaros, Walter Kudla and Lawrence Kudla alleging violations of Article II, Section 10; Article VI, Sections A and C; and Article I, Section 2 of the International Constitution "by refusing to sign a union authorization card regarding his employer Allied Equipment Mart, Flushing, New

York, so that I could organize this non-union barn." 88/

Article II, Section 10 of the Constitution and By-Laws of Local 282 provides that:

> "Any member who engages in a course of conduct degrading of itself, or calculated to bring this Local Union or its members into disrepute, or who acts in a manner inimical to the interests, objects and purposes of this Union may, upon conviction by the Executive Board be fired, suspended or expelled."

Article VI, Section A provides that:

> "Every member by virtue of his membership in this Local Union is obligated to abide by these By-Laws and the International Constitution with respect to his rights, duties, privileges and immunities conferred by them. Each member shall faithfully carry out such duties and obligations and shall not interfere with the rights of fellow members. Each member shall take the oath of obligation."

Article VI, Section C reads as follows:

> "No member shall interfere with the elected officers or business agents of this organization in the performance of their duties and each

> member shall, when requested, render such assistance and support in the performance of such duties as may be required by them, provided that this does not interfere with the individual rights of members. Each member and officer shall adhere to the terms and conditions of pertinent collective bargaining agreements and shall refrain from any conduct that would interfere with the performance by this Local Union of its legal and contractural obligations."

Article I, Section 2 of the International Constitution sets forth the broad, general objects of the International Union.

The charges were presented by Worhacz at an Executive Board meeting on January 19, 1978 at 5:00 p.m. Secretary-Treasurer Sasso presided, with Members Argento, Boggia, Gesualdi, Carbone, Bai and McFarland present.

The evidence presented to the Executive Board as encapsulated in the minutes of the meeting fairly echoes the material in the previous section of this decision.

Worhacz and his witnesses, Nicolai and Fitzpatrick, with another, not previously identified in the record of this case, one Scappitone, stated that Kuebler, Curd, Katsaros and Lawrence Kudla worked at Allied from time to time. Worhacz and his witnesses testified that Worhacz had offered cards to Katsaros in July and to Kuebler, Katsaros and the Kudlas in November, but they had refused to sign. Katsaros presented the case for the charged parties, maintaining that they had never worked for Allied, but for Allied's customers. They admitted that they had refused to sign the cards in November, but pointed out that they had asked to see the Delegate. There was no evidence that Curd was ever given a card to sign. 89/

Following the meeting the Executive Board, on February 8, 1978, ordered that

Curd be suspended for two years based upon his "failure to report to the Union a non-union under-the-hat job where you were working."

Also on February 8, Kuebler, Katsaros and Lawrence Kudla were expelled from the Union because of their "failure to report to the Union a non-union, under-the-hat job where you were working and your failure to cooperate with a Union representative to organize the non-union, under-the-hat job where you were working."

The charges against Walter Kudla were dismissed by the Executive Board because there was no testimony that he had ever worked for Allied.[90/]

All of those who were disciplined were advised of their to appeal these decisions to the Executive Board of Joint Council 16 under the provisions of Article XIX of the International Constitution.

They appealed, and the matter was heard by the Executive Board of Joint Council 16 on March 14, 1978. Joseph Tretotola, the President of Joint Council 16 presided, the other members of the Board being Joseph Konowe, Eugene Bennett, John DeLury, Anthony Distini, Daniel Levinger and Charles Ulrich. A verbatim transcript of this hearing was made and introduced into the record of this case. The transcript shows that Trerotola did a creditable and competent job in keeping control of the passions and rages of the participants, but the record is full of references to events and to personalities which had little relevancy to the issues before the Executive Board. As in the report of the Local 282 Executive Board hearing, Worhacz and his witnesses testified that the charged parties refused to sign cards and had

been seen driving trucks for Allied. 91/ The charged parties maintained their position with regard to Allied. A great deal of the material which fills the record in the instant case was also discussed, briefly, and all parties expressed their satisfaction at the close of the hearing.

Nonetheless, the Joint Council Executive Board sustained the action of Local 282's Executive Board and the matter was appealed further to the General Board of the International Union.

Under date of July 17, 1978 the International Union's General Secretary-Treasurer informed the parties that the General Executive Board, meeting cn July 12, 1978, had voted to reverse the decisions of Joint Council 16 and Local 282. In a memorandum attached to this letter the General Executive Board found that:

> "In view of the failure of Brother Worhacz to present sufficient substantive evidence to establish that the charged parties were employees of the Allied Equipment Mart on the date or dates that he requested them to sign authorization cards, it was decided that the decisions of Joint Council 16 and Local 282 be reversed."

Kuebler, Curd, Katsaros and Kudla were ordered reinstated upon payment of any financial obligations which may have accrued after their expulsion, and they were deemed to have continuous good standing from the effective dates of the Local Union's expulsion.

The General Executive Board did not comment on whether the charges were warranted at all in the light of Article XIX, Sections 6, 7 and 8 of the International Constitution; or whether the proper 10 day notice was given under Article XIX, Section 1(b); or whether the charges were stated with sufficient specificity under the same subsection.

There is no question about the Union's right under Section 8(b)(1)(A) of the Act to prescribe "its own rules with respect to the acquisition or retention of membership therein." Nor is there any issue in the Union's freedom to enforce a properly adopted rule which reflects a legitimate union interest and which impairs "no policy Congress has imbedded in the labor laws." Scofield v. N.L.R.B., 394 U.S. 423 (1969). The facts in this case show that the asserted legitimate union interest served as a pretext for another, unlawful, motive.

The background of this case shows the animus and hostility of shop steward Worhacz and Business Agent McFarland to John Kuebler because of his vigorous and militant pursuit of his rights under the seniority system and the collective bargaining agreements between the Union

and Willets Point. I have not credited Worhacz's assertion that his resentment toward Kuebler derived from Kuebler's "employment" at Allied. In fact I find that Worhacz's alleged observations of Kuebler at Allied on many occasions in 1976 and 1977 did not occur, and, indeed, are a result, rather than a cause, of Worhacz's hostility. Worhacz's hostility extended to Curd as a result of Curd's jointing in Kuebler's complaints and grievances. This generalized hostility was given a sharper focus when first Kuebler, then Curd, became affiliated with FORE. Worhacz's feelings toward FORE and its adherents are amply documented by the credible evidence in this record. Further documented in my findings are the several manifestations of that hostility directed against Kuebler and Curd during the spring and summer of 1977, in Kuebler's relations

with Mascali, and culmintating in the discharge of Kuebler and Curd from Willets Point, all of which I have found to be unlawful, and all of which proceed from Worhacz's animus and hostility toward these two employees, and from the total control over the assignment of work delegated to Worhacz by Willets Point.

The charges filed with the Union were based on the alleged refusal by the charged parties to cooperate with Worhacz in an effort to organize their employer. All of the charged employees except Walter Kudla had driven trucks for Allied, but they were aware that their connection with Allied did not constitute an employer-employee relationship. Worhacz, too, despite his relatively unsophisticated and somewhat primitive concepts of labor law, had discussed the Allied situation with Horowitz and

Alberti. It is neither logical nor believable that he was not aware of the fact that the people who did not work for or at Allied were, at the most, casual, intermittent employees, even if is were necessary to obtain union authorization cards from people who had all been union members for many years. Moreover, I have found that the charged employees were not in fact driving trucks for Allied on the evening of November 22.

The evidence is overwhelming that these charges were wholly pretextual and that the real reason was the furtherance of Worhacz's campaign of retaliation against Kuebler and Curd because, in part, of their association with FORE. The opportunity on November 22 to rid the Union of Kuebler and Curd, and at the same time to eliminate the top leadership of FORE must have been an opportunity

too great for Worhacz to resist. The whole process thus is irrevocably stained with illegality from the outset.

It is unnecessary to go further into the disciplinary process beyond noting my agreement with the findings of the General Executive Board, based on my own review of the minutes of the Local 282 Executive Board hearing, the transcript of the Joint Council 16 Executive Board, based on my own review of the minutes of the Local 282 Executive Board hearing, the transcript of the Joint Council 16 Executive Board hearing, and the testimony of the witnesses at this hearing. However, I have pointed out several other procedural deficiencies not mentioned in the decision of the General Executive Board. In addition, while there was much talk at the Joint Council 16 hearing about fairness and lack of prejudice, there was no evidence

that the parties ever attempted to work out their differences; and that there was ever any attempt by the local officers of Local 282 to contact the charged parties to assist in a legitimate organizing campaign; 92/ that Worhacz, as a steward, was not a Business Agent or an elected official within the meaning of Article VI, Section C of the Local 282 By-Laws; or that one of the reasons for the disciplinary action, the under-the-hat job, was not even mentioned in the charges. Further, the parties to this case stipulated that between January 1, 1970 and February 7, 1978, the date of the Local 282 Executive Board decision in this matter, there were no decisions rendered by Local 282's Executive Board against any other members which resulted in expulsions or suspensions of any member from Local 282 and there were no discussions

by the Executive Board that might have resulted in such decisions during that period.

In the light of all these circumstances I cannot escape drawing the inference that instead of regarding these charges by Worhacz in an objective and judicious manner, or trying to work out a compromise solution, the Executive Board of Local 282 saw in this situation an apportunity to rid the Union of two of the leading dissidents, the President and Secretary of FORE.

Thus I find that both the charges themselves and the disciplinary process were utilized as a pretext to disguise the Union's real motivation which was to retaliate against Kuebler, Curd, Katsaros and Lawrence Kudla because of their protected, concerted activity in pressing complaint and grievances, their connection with FORE, and their having filed

charges with the National Labor Relations Board against the Union. 93/ Carpenters Local Union No. 22 (Graziano Construction Co.), 195 NLRB 1 (1972).

Counsel for the Union has cited Local 100, Transport Workers Union of America, AFL-CIO (Liberty Coaches, Inc.), 230 NLRB No. 83 (1977) as standing for the proposition that no violation of law can be found here because the expulsion and discipline of the Union members was nullified by the action of the General Executive Board. I think this case is distinguishable from Libery Coaches, Inc., in that, in the latter case Administrative Law Judge Herbert Silberman, whose decision was affirmed by the Board, found that there was no evidence that the "intraunion proceedings brought against (the individual employee) were in any manner irregular or that he was denied any of his

substantive or procedural rights under the constitution" of the union there involved. 94/ The instant case presents a wholly different picture since I have found the whole proceeding to be much more irregular, and since both the substantive and procedural rights of the charged parties were violated throughout the proceedings by Local 282.

I find and conclude that the Union through the charges and discipline imposed on Kuebler, Curd, Katsaros and Lawrence Kudla has violated Section 8(b)(1)(A) of the Act. Further, even the absence of any evidence that this action caused any employer to discriminate against these employees I find that a natural and foreseeable consequence of expulsion or suspension from the Union is the denial of employment. The record amply shows that the industry, or the unionized portion of it, operates ex-

clusively through the shape system. There is no evidence that anyone other than members of Local 282 ever shaped at any of the locations referred to in the voluminous record of this case. Thus I find that during the period that Kuebler, Katsaros and Lawrence Kudla were expelled, and Curd was suspended, from February 7 to July 17, 1978 the Union violated Section 8(b)(2) of the Act.

IV. Conclusions of Law

1. Respondent Local 282 is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent Frank Mascali Construction Co., Inc. and Frank Mascali Construction G.C.P. Co., Willets Point Contracting Corp., and Allied Used Truck Exchange, Inc. are employers within the meaning of Section 2(2) of the Act and are engaged in commerce within the

meaning of Section 2(6) and (7) of the Act.

3. The Respondent Union by its Shop Steward, Robert Worhacz, violated Section 8(b)(1)(A) of the Act on July 12 and August 31, 1977 by threatening union members because they had engaged in protected concerted activity for their mutual aid and protection, and because they had joined an organization called FORE in furtherance of such mutual aid and protection.

4. The Respondent Union by its Shop Steward, Robert Worhacz, violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer John Kuebler and Charles Curd to work assignments between July 25 and October 21, 1977 in retaliation for their exercise of their rights under Section 7 of the Act.

5. The Respondent Union by its Shop

Steward, Robert Worhacz, violated Section 8(b)(1)(A) and (2) of the Act on August 29, 1977 by falsifying shape records and by failing to refer Charles Curd to employment because he had exercised his rights under Section 7 of the Act.

6. The Respondent Union by its Shop Steward, Robert Worhacz, violated Section 8(b)(1)(A) and (2) by falsifying shape records, thereby causing the discharge of John Kuebler and Charles Curd by their employer Willets Point Contracting Corp. on October 21, 1977, in retaliation for their exercising their Section 7 rights.

7. The Respondent Union by its Secretary-Treasurer, Robert Sasso, violated Section 8(b)(1)(A) be refusing to process grievances filed by John Kuebler and Charles Curd because they had filed charges with the National Labor

Relations Board.

8. The Respondent Union by its Shop Steward, Robert Worhacz, violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer John Kuebler and Charles Curd to Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc. under an arrangement to refer employees to these employers, because Kuebler and Curd had exercised their rights under Section 7 of the Act.

9. The Respondent Union by its Shop Steward, Robert Worhacz, violated Section 8(b)(1)(A) and (2) of the Act by causing Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc. to discharge their employee, John Kuebler, in retaliation for his exercise of his rights under Section 7 of the Act.

10. The Respondents Frank Mascali

Construction G.C.P. Co. and Frank Mascali Construction Co., Inc. violated Section 8(a)(1) and (3) of the Act by accepting and condoning an arrangement with the Respondent Union for referral of employees on and after September 2, 1977 because that agreement unlawfully discriminated against such employees.

11. The Respondents Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc. violated Section 8(a)(1) and (3) of the Act by discharging their employee John Kuebler on September 2, 1977 under an arrangement with the Respondent Union which discriminated against Kuebler because of his exercise of his rights under Section 7 of the Act.

12. The Respondent Union by its Shop Steward, Robert Worhacz, and its Executive Board violated Section 8(b)(1)(A) and (2) by the filing of false intra-

union charges against John Kuebler, Charles Curd, Ted Katsaros and Lawrence Kudla, and by, on February 8, 1978, expelling Kuebler, Katsaros and Kudla from membership, and suspending Charles Curd from membership in Respondent Union in retaliation for their exercise of their rights under Section 7 of the Act.

13. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that Local 282, the Respondent Union, has engaged in certain labor practices I will recommend that it cease and desist therefrom and take certain action designed to effectuate the policies of the Act.

I have found that the Respondent Union threatened and coerced Union members Kuebler and Curd because of their exer-

cise of their Section 7 rights. I shall recommend that it cease and desist from such conduct.

I have found that Respondent Union failed and refused to refer Kuebler and Curd to assignments to which they were entitled because of their seniority at Willets Point because of their exercise of their Section 7 rights. I shall recommend that it cease and desist from such conduct.

I shall further recommened that the Respondent Union compensate Kuebler and Curd for all days between July 25 and October 21, 1977 on which their seniority would have entitled them to be assigned to work together with all payments to Health and Welfare and Pension Funds necessary to their continuing eligibility to receive benefits from these funds, whether or not they shaped or shaped late on those days, with interest

on any moneys due to be computed in the manner prescribed in Florida Steel Corporation, 231 NLRB 651 (1977).

I have found that Respondent Union caused the discharge of Kuebler and Curd by their employer, Willets Point Contracting Corp., on October 21, 1977 through the maintenance of false and fraudulent attendance records. I shall recommend that Respondent Union cease and desist from compiking and maintaining records on that basis and take the following affirmative action:

> First, correct those attendance records for the period from June 6, 1977 to October 21, 1977 to reflect the facts found by me in this case;
>
> Second, request the employer, Willets Point Contracting Corp. to reinstate Kuebler and Curd to the places they held on the seniority list without prejudice to any rights or benefits they may have;
>
> Third, if the employer will reinstate Kuebler and Curd as requested, then pay them backpay for all days they would have worked between

October 21, 1977 and the date of their reinstatement computed on a quarterly basis with interest thereon to be computed in the manner prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950) and Florida Steel Corporation, supra. [95/]

Fourth, if the employer will not reinstate Kuebler and Curd as requested, then to continue to pay them backpay computed in the same manner until such time as they have found substantially equivalent positions elsewhere.

I have found that Respondent Union through the implementation of its arrangement with Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co. caused the discharge of John Kuebler because of his exercise of his Section 7 rights. I shall recommend that the Union cease and desist from implementing its agreement in a discrminatory manner and that it notify Mascali that it no longer has any objection to Kuebler's employment by Mascali.

I have found that Respondents Frank Mascali Construction G.C.P. Co. and Frank

Mascali Construction Co. discharged John Kuebler as a result of its implementation of their arrangement with the Respondent Union and because of the Union's discrminatory enforcement of that arrangement. I shall recommend that Mascali cease and desist from such conduct, and that Kuebler be offered reinstatement. I shall further recommend that Respondent Union and Mascali are jointly and severally liable for all backpay to Kuebler on account of their discrimination against him, computed in the manner outlined above. 96/

I have found that the Respondent Employers condoned and gave effect to the discriminatory hiring practices implemented by the Union under its arrangement with Mascali. I shall not order the arrangement to be discontinued since I believe that its discriminatory features will be adequately remedied by

my recommended order to the Respondent Union. I will recommend, however, that the Respondent Employers together with the Respondent Union shall be jointly and severally liable for any backpay shown to be due to any employee on account of discriminatory referrals to the Respondent Employers from on and after September 2, 1977 to the date of compliance with this order or to the date the arrangement terminates, whichever comes sooner.

I have found that Respondent Union unlawfully brought charges against its members and expelled or suspended them form membership. I shall recommend that it cease and desist from this conduct, and I shall further recommend that it compensate these members for any lost wages they may have suffered as a result of this unlawful action in accordance with the formula outlined above.

In view of the serious nature of these charges, I shall recommend an order boradly prohibiting similar conduct by Respondent Union.

Upon the following findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 97/

ORDER

Respondent Local 282, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Threatening, restraining or coercing its members because they exercised their rights under Section 7 of the Act.

(b) Maintaining its seniority list at Willets Point Contracting Corp. in such a manner as to unfairly discriminate and retaliate against its members.

(c) Maintaining attendance records at Willets Point Contracting Corp. on a false and fraudulent basis.

(d) Implementing its arrangement with Frank Mascali Construction Co. and Frank Mascali Construction G.C.P. Co. in a discriminatory manner.

(e) Bringing false and fraudulent intro-union charges against its members.

(f) In any manner interfering with, restraining, or coercing any employee members in the exercise of their rights guaranteed by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered by reason of the discrimination against them in the manner set forth in Section

V of this decision, entitled "The Remedy."

(b) Correct the attendance records at Willets Point Contracting Corp. in accordance with this decision.

(c) Request Willets Point Contracting Corp. to immediately and fully reinstate John Kuebler and Charles Curd to their former jobs, or if these jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Compensate John Kuebler, Charles Curd, Ted Katsaros and Lawrence Kudla for any wages they may have lost on account of the discrimination against them in the manner described above in Section V entitled "The Remedy".

(f) Preserve and, upon request, make available to the Board or its agents for examination or copying all seniority

lists, attendance records, or records showing starting times, job assignments and hours worked, and all other records necessary for the determination of the amount of backpay due under the terms of this order.

(g) Post at its business offices, union halls, meeting halls, all barns of employees with whom it has collective bargaining agreements, and any other places where it customarily posts notices to members copies of the attached notice makred "Appendix A." 98/ Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent Union's President and Secretary-Treasurer, shall be posted by the Respondent Union immediately upon receipt thereof in the manner provided above. Notices are to be posted for 60 consecutive days in conspicuous places, including all places

where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that the notices are not altered, defaced or covered by any other material.

(h) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this decision what steps have been taken to comply herewith.

Respondents Frank Mascali Construction Co., Inc. and Frank Mascali Construction G.C.P. Co. shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against their employees because they have exercised their rights under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative

action which is necessary to effectuate the policies of the Act:

(a) Make whole John Kuebler for any loss of pay or benefits he may have suffered by reason of the discrimination against him in the manner set forth in Section V of this decision, entitled "The Remedy."

(b) Make whole any other employees for any loss of pay or benefits they may have suffered by reason of discrimination against them, in the manner as set forth in "The Remedy".

(c) Preserve, and upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due under the terms of this Order.

(d) Post at their place of business in Flushing, New York, copies of the attached notice makred "Appendix B." 99/ Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' representatives, shall be posted by them immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of receipt of this order, what steps Respondents has taken to comply herewith.

Dated, New York, NY October 19,

1979.

GEORGE F. MCINERNY
Administrative Law Judge

NOTICE OF

MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT threaten, coerce or restain Union members because they have engaged in protected, concerted activities for their mutual aid or protection.

WE WILL NOT maintain seniority lists or shape records in a false or fraudulent manner.

WE WILL NOT refer employees to jobs in an unfair or discriminatory manner.

WE WILL NOT maintain or implement hiring arrangements in a discriminatory manner.

WE WILL NOT bring false or fraudulent intra-union charges against our members.

WE WILL NOT in any manner interfere with, restrain or coerce our members in the exercise of any rights guaranteed

them by the National Labor Relations Act.

WE WILL make whole John Kuebler, Charles Curd, Ted Katsaros and Lawrence Kudla for any loss of pay and other benefits they may have suffered because of our discrimination against them.

WE WILL correct the shape and attendance records at Willets Point Contracting Corp.

WE WILL request Willets Point Contracting Corp. to reinstate John Kuebler and Charles Curd.

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
(Labor Organization)

Deated_____By_____
President

Dated_____By_____
(Secretary-Treasurer)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of positing and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discharge our employees because they have engaged in protected, concerted activity for their mutual aid and benefit.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of any rights guaranteed them by the National Labor Relations Act.

WE WILL make whole John Kuebler and any other employees who have suffered losses in wages or other benefits because of our discrimination against them.

FRANK MASCALI CONSTRUCTION CO., INC. FRANK MASCALI CONSTRUCTION G.C.P. CO.

Dated_____ By_____
(Representative) (Title)

Dated_____By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street - 4th Floor, Brooklyn, New York 11241 (Tel No. (212) 330-7709).

FOOTNOTES

1/ The Complaint was amended at the hearing to add Frank Mascali Construction Co., Inc. as a respondent. The parties stipulated that these Corporations are a single integrated business enterprise.

2/ The transcript from June 23, 1978 is hereby amended to change the numbers of the pages from 1850 to 1911 to 1850A to 1911A. There are numerous typographical errors and misspellings in this transcript. In the absence of any motion to amend, and since my reading of the record reveals no place where there is a clear misstatement or no place where the meaning cannot be discerned by reference to the context, the transcript is not further corrected.

3/ Also referred to in the Complaint as Willets Point Constructing Corp.

4/ Thus there are references throughout the record to "Tully" which may be taken to mean Willets Point except where references are made to one or another of the Tully brothers who are the owners of Willets Point.

5/ The meaning of this term and the significance of the "shape" system will be discussed below.

6/ Section 9, dealing with seniority states that each employer shall apply "Barn seniority with a Master List." Other provisions deal with situations not material here.

7/ It was stipulated by the parties

that Richard Moore and Frank Daley, who acted as dispatchers for Willets Point during times material here, were supervisors within the meaning of the Act.

8/ Since this case deals only with circumstances which occurred in the morning, it is not necessary to discuss afternoon or evening practices.

9/ However, if the latest departure time posted is earlier than 8 o'clock, then that earlier departure time becomes the last shape of the day.

10/ For twenty years until his termination in April 1976 the dispatcher was Richard Moore. After Moore left his place was taken by Paul Tully, described as one of the owners of Willets Point. In 1977 a new dispatcher was hired whose name is Frank Daley. Paul Tully apparently is the management official primarily responsible for the operation of the dispatch of employees. The original copy of the shape sheet is marked, and referred to in the record, as "Paul's Copy" but the record does not reveal what Paul does with it, if anything.

11/ The shop steward throughout the times material to this case is Robert Worhacz.

12/ This document is referred to in the record as the "shape sheet," as opposed to the other copy which stays int the dispatch office and is known as "Paul's copy.".

13/ As well as the responsibility for

dispatching and maintaining records of other employees of Willets Point who were represented by the Operating Engineers Union and are not involved here.

14/ It is not clear from the record in this case just when this happened. In another case involving this Union and Willets Point, Administrative Law Judge Irwin Kaplan found that it occurred in the fall of 1974. Since there is nothing in this record inconsistent with that finding, I accept it as a fact. See Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Willets Point Contracting Corp.), Case No. 29-CB-2624, Judge's Decision dated May 31, 1977, adopted pro forma, in the absence of excepting, by the Board on July 14, 1977, unpublished. Since the charging party in that case was one Frederick C. Brudie, the case is referred to in the record of this case, and in this decision, as the Brudie case.

15/ This was apparently done without the knowledge or approval of higher Union officials, although Worhacz did state at one point that a Business Agent was present, he later denied this.

16/ This is consistent with the record in this case and with the findings of Judge Kaplan in the Brudie case.

17/ As Worhacz expressed it to the men, "If you keep in touch with the job, the job will keep in touch with you."

18/ There is evidence that other companies, identified in the record only by their names, Colletti, Edenwald Grace, Custom (or Kustom) called the Willets Point dispatch office with some regularity looking for extra help. Worhacz testified that these employerss frequently asked for drivers by name, in which case he referred the requested individual. As noted below, I have doubts as to Worhcz's credibility. Thus, I do not find the facts to be as reported by him even though his statement is uncontradicted in the record.

19/ Neither of these witnesses could remember anything about the meeting except that McFarland said they had to shape every day. Based on their faulty memory, as well as their demeanor while testifying, I do not credit their testimony in this regard.

20/ Other than a couple of allegations that Worhacz had neglected to process grievances filed by Kuebler and Curd which I do not consider significant.

21/ See Judge Kaplan's discussion of the Union's procedures in selecting and removing shop stewards in the Brudie case. See also Local 282, International Brotherhood of Teamsters, Chauffeurs, and Helpers of America (Explo, Inc.), 229 NLRB 347 (1977).

22/ It was as a result of this incident that Curd called McFarland to the job and a meeting took place on January 27. The content of the meeting is discussed above.

23/ From this point on all dates in

1977 unless otherwise specified.

24/ In the Brudie case Judge Kaplan commented on Kuebler's previous request for such a slip in July of 1975, which was thwarted by the company's refusal to agree to it under the then existing contract provisions.

25/ This is a little, official-looking slip of paper which seems to verify that Kuebler worked for Willets Point and states that "it does not necessarily mean you are qualified to receive benefits." It certainly does not look like any layoff letter or notice that I have ever seen, but I cannot make any finding on it one way or another.

26/ The letters stand for the words "fear of reprisal ends," an optimistic sentiment not warranted by the facts of this case. FORE is also associated with a national dissident Teamsters group known as PROD, for Professional over-the-road Drivers.

27/ Known variously in the record as Cutler, Kudler and Kuedler.

28/ At one of these meetings in October 1976 Katsaros was assaulted by another member. There is no evidence to show that the assault was provoked by any responsible officer of Local 282. Indeed the fight was broken up by Secretary-Treasurer Robert Sasso.

29/ Variously referred to in the record as Polis, Pollis, Poulous or Plulos.

30/ Poulos was number 14 on the Willets Point seniority list, between Knozelman

and Kuebler.

31/ There are two employees on the Willets Point list named Carmine Tufano (also spelled Taffano or Defano in the record). There are not father and son, but are cousins, so in order to distinguish them, they are designated on the list, and referred to, appropriately enough, by the Roman numerals I and II, I being number 2 on the list and II being number 5.

32/ This must have been in February as Worhacz was in Florida on vacation at that time in 1977.

33/ Despite the length of this case, and the size of the record, there are still unanswered questions. One of these is why Poulos, who was present at several of these early incidents, and was the central figure in this petition, seems to drop out of sight completely. Worhacz's records show that he shaped regularly down to July 12, 1977, and worked occasionally, but he is not mentioned as a participant in any activities after the petition was withdrawn, and was not called upon to testify in this proceeding.

34/ Desribed in the record as Paternostro.

35/ The record does not reveal what other supervisory personnel or equipment operators were assigned to Mascali from Willets Point. This case concerns only drivers.

36/ Known as "Bo" or "Beau" and sometimes as "Paul" Mascali.

37/ The term "major" is merely used to indicate the lengthy time these witnesses spent on the witness stand, as opposed to "minor" witnesses, some of whose testimony is equally as important, but who spent less time in actually testifying.

38/ Wigmore on Evidence, 3rd Ed. Sec. 1391.

39/ As shop steward he was ex officio the first name on the list.

40/ The assistant shop steward. His union functions gave him no preference on the seniority list.

41/ Mohr is sometimes confused with Richard Moore, the dispatcher for Willets Point until April 1976.

42/ Holmes had no number on the list, but his name appeared there on all the records maintained by Worhacz.

43/ The shape information was transcribed by Worhacz onto another sheet, which he described as and will be referred to herein as, Worhacz's personal records. This record also recorded the hours each man worked, in order to check on the payroll department, along with other information on jobs worked and the doings of employees. Worhawcz is a careful and meticulous recordkeeper, and his records appear to contain few inadvertent errors. Whether they contain intentional errors, or misrepresentations of fact, is another question which will be discussed below.

44/ I credit Kuebler's version of this

incident, but I cannot believe that Worhacz, with his total comman of the assignment process, would permit assignments out of seniority unless it suited him to do so. Take note of McGarland's reaction on August 31 to out-of-seniority assignments discussed below. I find that, contrary to Worhacz's testimony, no one was referred to any outside job from the Willets Point list, including unlisted employees who were shaping Willets Point, without the knowledge and approval of Worhacz. His care in keeping records so as to record everyone's whereabouts, his instructions to Alberti and Hernandez concerning their employment by Allied, and his remarks to Christman concerning Konzelman, and his ability to take care of people on his "team" show the degree to which he controlled the employment process at Willets Point.

45/ Note: Paul's copy shows that neither Kuebler nor Curd shaped on July 12, or at any time during that week. The documents referred to as Worhacz's personal records show that Kuebler shaped on July 11 but not on July 12, and that Curd did not shape at all in that week.

46/ The evidence sows that Holmes, who was junior to Kuebler was part owner together with Paul Tully, of a truck which operated under the name of Ker-Pau." This truck worked 180 hours for Mascali during 1977. There is no record on the shape sheet of this truck, or of Holmes going out on assignment. Paul's copy and Worhacz's personal records do show Holmes shaping and being assigned to it, but there is no record

of hours.

47/ This truck was later identified as belonging to a company called TWT, the initials representing the initials of Mrs. Grace Tufano I, Mrs. Robert Worhacz and Mrs. Paul Tully. Worhacz denied that he had any financial interest in it, but did admit that he was an officer of the corporation. There is no record of the TWT truck either on the shape sheet or on Paul's copy. The only references are in Worhacz's personal records showing the TWT truck assigned to Hernandez on the GCP job during the weeks of July 18 and August 1 weeks, incidentally, when this record is kept in a handwriting different from that of Worhacz. For the weeks before and after these weeks, Hernandez is described as driving a "flat truck." The TWT truck does not appear again in these records until October 11 and 18, when it is shown on Worhacz's personal records as assigned to Martucci, then on October 25 and 26 to Alfred Nic lai.

48/ Kuebler and Curd testified that they always shaped at 8:00 a.m.

49/ The Ker-Pau situation is one of the unsolved mysteries of this case. Despite the size of the record, and the exhaustive discussion of the issues, there are no answers to some questions raised by the facts. For example, why did Paul Tully, one of the owners of Willets Point have interests in Ker-Pau, and, through his wife, in TWT, since those two trucks could be considered competitive with Willets Point. On May 2 the records show that only six Willets

Point trucks were dispatched, along with the Ker-Pau truck. There is no explanation of why Holmes, the lowest man on the seniority list, was dispatched from Willets Point on the Ker-Pau truck. Even though Holmes owned a percentage of the truck, and if he had wished he could have gone around himself looking for work, the records show that he was dispatched onthe truck from Willets Point. Carmine Tufano II, whose wife was a part of the TWT deal, never was assigned to that truck, so Holmes case seems to the be something of an anomaly. The only logical explanation appears to be the minority hiring problem at Mascali, discussed below, but this does not relieve the Union from the Burden, if the Ker-Pau truck was dispatched from Willets Point, of assigning to it the senior driver who shaped on that day. Holmes would, in any case, be entitled to his share of the rental of the truck. Nor would the fact that the driver would be paid by someone else make any difference, since this was the practice in most outside assignments.

50/ Nourry is not on the Willets Point list. Worhacz described him as a "shape bum" who moves around from one location to another looking for work.

51/ I view Worhacz's action in referring Konzelman to a job, even though that job may have been more or less permanent, as violative of his duty to refer by seniority. Curd was senior to Konzelman, and, in the absence of discrimination, should have been referred first.

52/ Note: The records show that up to the week beginning June 6 the last shape was at 7:00 or 7:30 on most days. On June 6 and thereafter down thorugh August 26, with the exception of June 17 and July 5, the last shape was at 8:00 a.m. This later starting time seems to be due to the fact that the shape time for employees assigned or sent to the GCP job was consistently at 8:00 a.m.

53/ Also referred to in the record as Matucci, Martocci, or Matocci.

54/ I do not believe Worhcz's statement that he told Kuebler and Curd "many times" to report earlier when they shaped.

55/ Kuebler and Curd testified that they saw junior men working during this period, but they were put off by Worhacz's dissembling excuses. In this, they may have been naive, but not negligent.

56/ Two trucks belonging to Melita were garaged at Willets Point, and Willets Point drivers were sometimes assigned to them according to Worhacz's personal records. During the summer of 1977, these trucks were moved and were no longer used.

57/ Worhacz testified that Curd called him on the 29th and complained about martucci's assignment. He was not satisfied with Worhacz's explanation and accused the steward of being unfair and not giving Curd the work that he should. Curd denied this, but I do not find it necessary to resolve this con-

flict although Worhacz's story seems more logical int he circumstances. Carbone was a new business agent and at that time was relatively unfamiliar with the asphalt industry since his experience had been exclusively in the soft-drink industry.

58/ Worhacz's description of his own duties is somewhat hazy but his personal records show that he worked generally 10 hours or more each day during the period from April to October.

59/ There had been a meeting scheduled for October 20 on this matter, but Curd did not get the opportunity to appear. There is considerable testimony on this meeting, but I can discern no evidence that the failure to hear Curd's grievance on that date was due to any culpable action or lack of action by the Executive Board.

60/ By this time Kuebler and Curd had filed a number of charges against Local 282 and both had filed charges against Willets Point on account of their discharges. All of these cases except the charges in the instant consolidated Complaint were withdrawn or dismissed, but several, including the instant charges, were still pending on December 1.

61/ Curd had taken a photograph of the shape sheet on September 1, and offered this to the Board, but they refused to examine it. In any event, a comparison of the photograph with the shape sheet submitted in evidence in this case shows that they are exactly the same, through September 1.

62/ A 7:30 or earlier posting would require the payment of overtime. See discussion of the Shape System above. There is no indication in the record of why this was done, but the reason is not material to the issues here. Worhacz testified that both Alberti and Hernandez agreed to give up the overtime work to which their seniority would have entitle them, for the benefits of steady assignments to Mascali, thus indicating that the Mascali job was strictly an 8 hour job and Worhacz was aware of that fact.

63/ This was a simple task as the shape sheet is written in pencil and he would merely have to erase one time and write in another. However, the original shape for that date is in evidence, and while it shows clearly an erasure opposite the name of Carmine Tufano I, who called in sick that morning, and in the "location" column opposite Christman's name it shows absolutely no sign of an erasure, or rewriting of times, opposite the names of Alberti, Hernandez and Christman.

64/ As noted above, this would have been a very simple matter. Since August 29 was the first day of the week all Worhacz would have to do would be to recopy the original sheet and repost it in the shape trailer.

65/ The December 1 hearing seemed to me to be openly and fairly run by Sasso. All parties were given the opportunity to speak and to present their positions, but based upon what I have found to be manufactured and fraudulent evidence, the Executive Board had very little

choice. This does not, of course, mean that the Union can escape the consequences of such actions by its agent, Worhacz.

66/ The collective bargaining agreements in this industry call for arbitration of any discharge within 2 days of its occurrence.

67/ It was in preparation for this meeting that Curd had scratched out large portions of his diary. See the discussion of that diary, above.

68/ Not the same counsel who represented the Union in this proceeding.

69/ A listing of the names of his employees by Charles Mascali shows that this requirement would indeed present difficulties.

70/ Racial identification, while ordinarily irrelevant, is important to an understanding of this particular set of facts. In making these findings of fact, I rely on the credible testimony of Agnew, a Professional Engineer, and Daves, who is also a credible witness.

71/ Paternostro had previously called Worhacz, who was unable to supply him with enough drivers. He was thus concerned about covering the work for the next day.

72/ Variously spelled Silvera, Silvero adn Silvara in the record, I am informed in Respondent Union's brief that Savera, who is Black, was elected a Business Agent of Local 282 on December 10, 1978.

73/ The job continued until mod-December 1977, when it was shut down on account of the weather, then resumed in the spring of 1978, and was still in progress in mid-summer.

74/ I base this finding on the undenied and credible testimony of Charles Mascali.

75/ Apparently tractor-trailers and other specialized equipment were not covered by the arrangement.

76/ Curd testified that he had shaped at Mascali during 1977 and was not hired. This is not significant since, if Curd did shape Mascali, he would have been acting outside of the arrangement in question here which required shaping at Willets Point.

77/ Radio Officers' Union of Commercial Telegraphers Union, AFL v. N.L.R.B., 347 U.S. 17 (1974).

78/ While I do not credit some of Horowtiz's testimony,I have credited and relied on his testimony for general descriptions of Allied's business and methods of operation.

79/ Allied's mechanics are represented by the Operating Engineers. The Office employees are apparently unrepresented. Both mechanics and office employees were described as having participated in driving trucks for Allied.

80/ I found Alberti to be the most credible of the witnesses who testified concerning the connection between Allied and the Willets Point drivers. He was

open, candid, and his demeanor appeared to be reliable. Thus I have measured the testimony of others against Alberti's where possible, in order to arrive at my findings on this aspect of the case.

81/ Worhacz places this in the winter, Alberti in the summer. Alberti is a more reliable witness but the time is not really important.

82/ Horowitz's testimony that he keeps no records of trips by itinerant drivers nor of any moneys paid to them strains credulity, but if such drivers are used as seldom as Horowitz says, the statement that they are paid out of "petty cash" may be reasonable.

83/ Note his testimony to the Joint Council 16 Executive Board on March 14, 1978, that Katsaros and Kudla had been Kudla had been working for Allied only since July of 1977.

84/ Curd was not there. His diary carries the notation "went hunting" for November 22.

85/ Kuebler testified that there were some trucks parked there in front of Allied.

86/ My findings on this incident are based on the credible testimony of Kuebler and katsaros. It was agreed by the parties that if Lawrence Kudla testified about the incident, his testimony would be the same as that of Katsaros. Walter Kudla did not testify.

87/ See, e.g., Stouffer Management

Food Service, 210 NLRB No. 21 (1974).

88/ The charges against each employee were identical.

89/ See Worhacz's testimony in this case concerning the July 27 encounter, noted above.

90/ Although Worhacz and Nicolai stated in this hearing that all four, Kuebler, Katsaros and the two Kudlas, Lawrence and Walter, had driven trucks up to Allied before the cards were offered on November 22.

91/ Contrary to his testimony in the instant hearing that he saw Kuebler literally dozens of times working at Allied in 1977, and he himself had gone over to Allied on occasion to borrow things, Worhacz told the Executive Board that "I could never catch him in the process of working where I could offer them (sic) a pledge card."

92/ Katsaros stated, at the Joint Council 16 hearing, that he had never been asked to sign a card after the November 22 incident.

93/ The record shows that Katsaros had also filed charges against the Union.

94/ Bellinger Shipyards, Inc., 227 NLRB No. 95 (1976) cited by Judge Silberman in support of his conclusions does not require a contrary finding.

95/ See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

96/ Provided that Kuebler should not

receive any backpay for any one day in an amount larger than a single day's pay. Even though he may have suffered a double dose of discrimination, he is not entitled to double the backpay.

97/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

98/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shallbe changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

99/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PUR SUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRANK MASCALI CONSTRUCTION G.C.P. CO.; FRANK MASCALI CONSTRUCTION CO., INC.

and Case 29-CA-5975

JOHN KUEBLER, an Individual

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Frank Mascali Construction G.C.P. Co.; Frank Mascali Construction Co., Inc.)

and Case 29-CB-3075

JOHN KUEBLER, an Individual

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Willets Point Contracting Corp.)

and Case 29-CB-3115

CHARLES CURD, an Individual

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Allied Used Truck Exchange, Inc.)

and Case 29-CB-3235

CHARLES CURD, an Individual

DECISION AND ORDER

On October 19, 1979, Administrative Law Judge George F.McInerny issued the attached Decision in this proceeding. Threafter, Respondent Employers and Respondent Union filed exceptions and supporting briefs, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision and a Reply brief in opposition to the brief of Respondent Union.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs

and has decided to affirm the rulings, findings,[2] and conclusions [3] of the Administrative Law Judge, as modified herein.

1. Respondent Employers except to the Administrative Law Judge's finding that they violated Section 8(a)(1) and (3) of the Act by discharging John Kuebler on September 2, 1977, and Respondent Union excepts to the Administrative Law Judge's finding that it violated Section 8(b)(1)(A) and (2) of the Act by causing the discharge of Kuebler. We find merit in these exceptions.

At all times relevant herein, Respondent Frank Mascali Construction Co., Inc. (FMC), was engaged in repaving portions of the Grand Central Parkway and the Long Island Expressway under a contract with the State of New York. This operation was conducted

through a separate corporation, Respondent Frank Mascali Construction G.C.P. Co. (GCP).[4] GCP did not employ regular drivers of its own, and there is no evidence that it maintained a seniority list. Instead, it filled its needs by obtaining drivers on a daily basis first from FMC and then, pursuant to an arrangement with Respondent Union, from the Willets Point Contracting Corp. (Willets Point)[5] and Edenwald, another contractor. Under this arrangement, each afternoon Joe Paternostro, the GCP job superintendent, would determine his needs for the next working day, and then call Steve Costa, the general superintendent at FMC, to obtain all the drivers FMC could furnish. If Costa could not supply enough drivers, Paternostro first would contact Robert Worhacz, the Union's steward at

Willets Point, and, if necessary, Edenwald. If these sources were unable to fill GCP's needs for the next day, it was free under the arrangement with the Union to seek drivers from whatever source it desired. The Administrative Law Judge found, and we agree, that this arrangement constituted a collective bargaining agreement between the Employers and the Union.

Sometime in mid-August 1977, Robert Agnew, the night superintendent at GCP and a black, asked Frank Daves, a black owner-operator employed by GCP at night, if he knew a minority driver who would be available for fill-in work 2 or 3 days a week. Agnew also said that the GCP project would be continuing for an additional 5 or 6 months. Daves replied that he had a friend who needed work. Agnew,

however, did not pursue the matter.[6]

On September 1, Paternostro, after obtaining all the available drivers from FMC, still needed two drivers for the next day, the Friday before Labor Day. Pursuant to the arrangement with the Union, he contacted Worhacz, who told him he could promise to supply only one driver because of the impending holiday weekend. He then contacted Edenwald, which could not supply any drivers. Paternostro was then free under the arrangement to look for a driver from any available source.

Sometime that afternoon, while talking to Agnew, Paternostro mentioned that he was still seeking a driver for the next day. Agnew said he might be able to get one, and Paternostro told him to try to get a minority driver if possible. Agnew

then called Daves. After learning that his friend was unavailable, Daves contacted the shop steward at Hendrickson Brothers, another contractor. The latter was unable to supply or refer Daves to a minority driver, but gave Daves the phone numbers of Charles Curd and Kuebler, two Willets Point Drivers who occasionally shaped and worked at Hendrickson. (Curd and Kuebler are white.) Daves was unable to reach Curd. Although there is a conflicting testimony as to whether Daves personally contacted Kuebler and had him call Agnew, or only gave Kuebler's number to Agnew, as a result of Daves's efforts Agnew ultimately talked to Kuebler and told him to come to work. Agnew then told Paternostro that he had obtained a driver for him.

Kuebler reported for work at

GCP the next day and greeted Paternostro, whom he knew because Paternostro had previously been a superintendent at Willts Point. After filling out the required forms, Kuebler went to work driving one of Employer's trucks. He did not ask, nor did Paternostro tell him, how long he would be working for the Employers.

At the end of the day, Kuebler came to the office and asked what the schedule was for the next working day, Tuesday, September 6. According to Paternostro, he told Kuebler that he had to deal with Costa with regard to the Employer's trucks, that on Tuesday FMC might have an abundance of drivers, and that he did not know who would be driving the truck Kuebler had driven that day on Tuesday. Kuebler then said, "I'll see you

Tuesday" and Paternostro replied, "Okay, see me Tuesday." He stated, however, that he did not tell Kuebler to come to work or to the site on Tuesday. According to Kuebler, whom the Administrative Law Judge credited, Paternostro said that he did not have the schedule, would have to check with Costa, and that if the starting time was before 8 o'clock he would call him but otherwise he would see him Tuesday.

At some point that afternoon, Paternostro called Costa as usual to arrange for drivers for Tuesday. As was true the previous day, Costa was able to supply all but two of the needed drivers, so Paternostro called Worhacz. This time Worhacz said he was able to supply both drivers. Worhacz also mentioned that he had seen Kuebler working at GCP that day, to which Paternostro replied that Kuebler was the driver

Agnew sent him. According to Worhacz, he then told Paternostro that Kuebler would have ended up at GCP anyway if he had shaped at Willets Point, that he could supply enough drivers for Tuesday, and that Kuebler on Tuesday would shape at Willets Point in his regular position.

On Tuesday morning, September 6, Kuebler appeared at the GCP office and discovered that Fitzpatrick, a Willets Point driver senior to him, was driving the truck which Kuebler had driven on Friday. He asked Paternostro why he had not been assigned to that truck. Paternostro explained the arrangement with the Union for obtaining drivers and said he could not put him to work ahead of drivers referred from Willets Point. When Kuebler protested, arguing that because he had been hired on Friday he was now on GCP's seniority list,

Paternostro said there was nothing he could do. Subsequent efforts by Kuebler to obtain further employment at GCP, including several visits with Charles Mascali, the treasurer and asphalt plant superintendent of FMC, were unsuccessful.

In concluding that Respondent Employers violated Section 8(a)(1) and (3) and that Respondent Union violated Section 8(b)(1)(A) and (2) in the discharge of Kuebler, the Administrative Law Judge found that Kuebler was hired by Paternostro and Agnew as a permanent employee for the duration of the GCP project. He further found that Worhacz, as part of his discriminatory pattern of conduct against Kuebler, reminded Paternostro on September 2 of his obligation to obtain employees through Worhacz at Willets Point, and thereby caused him to terminate Kuebler. Con-

trary to the Administrative Law Judge, we find, for the reasons set forth below, that the General Counsel has failed to establish that Respondents have violated the Act as alleged.

As previously noted, GCP employed no regular drivers of its own, but instead filled its needs on a daily basis and through its arrangement with the Union. Only when these two sources were insuficient to meet GCP's needs for a particular day did it hire drivers from other sources. It was precisely the latter situation which led to the hiring of Kuebler by GCP on September 2. The mere fact that Kuebler worked 1 day did not make him a permanent employee of GCP.[7] And, since GCP had not previously employed regular drivers, it would have been a clear departure from its past practice to have hired Kuebler as a permanent employee.

Further, although GCP apparently was seeking a minority driver to fill in regularly when FMC and the Union were unable to fill its needs and to help meet certain affirmative action requirements, on September 1 its immediate need was for a driver for September 2 only, whether or not that driver was a member of a minority group.[8] Additionally, there is no evidence that GCP or its job superintendents, Agnew and Paternostro, ever told Kuebler that he was being hired as a permanent employee. Agnew, whom the Administrative Law Judge credited, testified that he never told Daves how long the driver he was seeking would work, nor did he tell Kuebler how long he would work. Furthermore, although Kuebler himself testified that Daves told him there would be about "six months' work" on the job if he was hired,[9] he also testi-

fied that he did not think that he had a commitment by GCP to employ him for 6 months and the reference to "six months' work" concerned the project, not the job he was being offered. Kuebler also admitted that he never asked Paternostro how long the job would last, and that neither Agnew nor Paternostro, who did the actual hiring, told him this was a permanent job.

Finally, we note that according to Kuebler's credited testimony, when he came into Paternostro's office after work on September 2, Paternostro told him that he would see him Tuesday unless there was a change in the starting time. The Administrative Law Judge concluded that this comment occurred after Paternostro had talked to Worhacz and the latter told him that Kuebler would be shaping at Willets Point on Tueday. Paternostro's statement can be inter-

preted to mean that at that point Paternostro still intended to use Kuebler on Tuesday, thereby supporting the conclusion that Kuebler was hired as a permanent employee. However, as the Administrative Law Judge recognized, Paternostro merely may have thought that Worhacz would explain the situation to Kuebler at the Willets Point shape on Tuesday morning, thereby enabling Paternostro to avoid a troublesome confrontation. In that context, Paternostro's statement is not inconsistent with a conclusion that Paternostro never had any intention of using Kuebler on Tuesday. Such a conclusion is supported by Paternostro's action on September 2 in scheduling his drivers for September 6. As noted above, after obtaining all the drivers available from FMC, he called Worhacz to obtain two more drivers. Assuming, arguendo, that

Kuebler had been hired as a permanent employee, these two drivers would have been in addition to Kuebler. If Paternostro subsequently had decided not to continue Kuebler's employment, he would then have had to obtain a driver to take his place, or operate one driver short. However, there is no evidence that Paternostro did either. Thus, it seems apparent that at the time Paternostro called Worhacz he had no plans to use Kuebler, and therefore that Kuebler had not been hired for a permanent job.[10]

In light of the above factors, particularly the ambiguity of Paternostro's statement to Kuebler after work on September 2, the fact that GCP employed no regular drivers of its own and hired drivers from sources other than FMC only to the extent necessary to fill its needs for a particular day,

and the lack of any evidence that GCP ever told Kuebler that he was hired as a permanent employee, we find the evidence insufficient to establish that Kuebler was hired as a permanent employee. Rather, we find that Kuebler was hired by GCP only for 1 day's work as a result of the failure of GCP's normal sources to furnish the drivers it needed for September 2. Accordingly, we find that Respondent Employers' failure to employ Kuebler after September 2 was unrelated to Union considerations and therefore not discriminatory. We further find that because Respondent Employers hired Kuebler for 1 day only, and because Paternostro had no plans to use Kuebler when he talked to Worhacz on September 2, Respondent Union did not cause the Respondent Employers to discharge him. Therefore, we conclude that Respondent Employers did not violate

Section 8(a)(1) and (3) by discharging Kuebler and that Respondent Union did not violate Section 8(b)(1)(A) and (2) by causing Respondent Employers to discharge Kuebler.[11]

2. The Adinistrative Law Judge found, and we agree, that from July 25, 1977, to October 21, 1977, Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by operating its referral arrangement with Respondent Employers in a discriminatory manner. The Administrative law Judge further found that Respondent Employers violated Section 8(a)(1) and (3) of the Act by accepting and condoning the arrangement. In so doing, the Administrative Law Judge limited the Employers' liability to the period beginning September 2, 1977, based on his finding that prior to that date the Employers had no actual knowledge of the Union's discriminatory

practices and no reason to make inquiries about a possible discriminatory manipulation of the referral system. Although we agree with these factual findings, we disagree with the Administrative Law Judge's conclusion that they operate to limit the Employer's liability. Thus, the Board has consistently held that when an employer delegates hiring to a union by utilizing a union referral system to obtain its employees, it is responsible if the union operates the system in a discriminatory manner. This is so even if the employer has no actual knowledge of the Union's discrimination. See, e.g., General Cinema Corporation and its wholly owned subsidiary, Gentilly Woods Cinema, Inc., 214 NLRB 1074,1076 (1974); Motor City Electric Company, 204 NLRB 460,463 (1973); Morrison-Knudsen Company Inc., Walsh Construction Company, and

Perini-Quebec, Inc.,d/b/a Robinson Bay Lock Constructors, A Joint Adventure, 123 NLRB 12, 24 (1959), enfd. 275 F. 2d 74 (2d Cir. 1960), cert. denied 366 U.S. 909 (1961). In the present case, the Administrative Law Judge found, and we agree, that the Employers and the Union entered into a collective-bargaining agreement whereby the Employers delegated to the Union the authority to hire drivers for them when FMC was unable to fill GCP's needs, and that the Union, through its agent, Worhacz, regularly supplied GCP with drivers but discriminatorily did not refer Curd or Kuebler. Accordingly, we find that Respondent Employers are jointly and severally liable with Respondent Union for the discriminatory operation of the referral arrangement with the Union from July 25, 1977, to October 21, 1977.

However, we find that even if Res-

pondent Employers had investigated the Union's operation of the referral system, they would not have discovered the discriminatory practices because the Union falsified the shape records. Threfore, we conclude, contrary to the Administrative Law Judge, that Respondent Union should be held primarily, and Respondent Employers secondarily, liable for any backpay due Kuebler and Curd because of discriminatory referrals to Respondent Employers from July 25, 1977, to October 21, 1977. See Union Boiler Company, 245 NLRB No.93 (1979); Wismer and Becker, Contracting Engineers 228 NLRB 779 (1977).

Finally, the Administrative Law Judge found Respondent Employers and Respondent Union jointly and severally liable for backpay shown to be due any employee because of discriminatory re-referrals to Respondent Employers. How-

ever, there is no evidence in the record showing a general pattern of discrimination by the Union in the operation of the referral system or that any employee other than Kuebler and Curd was the victim of the Union's discriminatory referrals. Accordingly, we shall limit backpay liability for the Union's discriminatory referrals to these two discriminatees.

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusions of Law 9, 10, and 11, and renumber the subsequent Conclusions of Law accordingly:

"9. Respondents Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc., violated Section 8(a)(1) and (3) of the Act by accepting and condoning an arrangement with Respondent Union for referral of employees

on and after July 25, 1977, because that agreement unlawfully discriminated against such employees."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby ordes that:

A. Respondents Frank Mascali Construction Co., Inc., Flushing, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Accepting and condoning an arrangement with the Respondent Union for referral of employees that unlawfully discriminates against such employees because they exercise their Section 7 rights.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the

rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) In conjunction with the Respondent Union, with Respondent Union primarily liable, make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered by reason of the discriminatory implementation of their arrangement with Respondent Union from July 25, 1977, to October 21, 1977, with backpay and interest thereon to be computed in the manner prescribed in F.W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). (See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962)).[12] Further, in conjunction with Respondent Union, with Respondent Union

primarily liable, make whole the above-named employees, by making contributions on their behalf to the Union's health and welfare and pension funds.[13]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analize the amount of backpay due under the terms of this Order.

(c) Post at their place of business in Flushing, New York, copies of the attached notice marked "Apendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 con-

secutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Forward signed copies of said notice to the Regional Director for posting by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, it being willing, at all locations where notices to members are customarily posted.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

B. Respondent Local 282, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, Elmont, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening, restraining, or coercing its members because they exercise their Section 7 rights.

(b) Maintaining its seniority list at Willets Point Contracting Corp. in such manner as to unlawfully discriminate and retaliate against its members.

(c) Maintaining attendance records at Willets Point Contracting Corp. on a false and fraudulent basis.

(d) Causing or attempting to cause the discharge of employees by Willets Point Contracting Corp. in retaliation for exercising their Section 7 rights.

(e) Refusing to process grievances filed by its members because they filed charges with the National Labor Rela-

tions Board.

(f) Failing and refusing to refer members to work assignments in retaliation for exercising their Section 7 rights.

(g) Implementing its referral system arrangement with Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc., in a discriminatory manner.

(h) Bringing false and fraudulent intraunion charges against its members and expelling or suspending them from union membership based thereon.

(i) In any other manner restraining or coercing any employee members in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Correct the seniority lists

and attendance records at Willets Point Contracting Corp. in accordance with this Decision.

(b) Request Willets Point Contracting Corp. to immediately and fully reinstate John Kuebler and Charles Curd to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered by reason of Respondent Union's discriminatory action in causing their discharge from Willets Point Contracting Corp. and its discriminatory failure and refusal to refer them to work assignments. In the event that the employer will not reinstate the above-named employees as requested, pay them backpay for

all days they would have worked between October 21, 1977, and the date of their reinstatement. In the event that the employer will not reinstate them, continue to pay them backpay until such time as they have found substantially equivalent employment. Backpay with interest thereon shall be computed in the manner prescribed in F.W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). (See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962)).[15] Further, make whole the above named employees by making contributions on their behalf to the Union's health and welfare and pension funds.[16]

(d) In conjunction with Respondent Employers, with Respondent Union primarily liable, make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suf-

fered by reason of Respondent Union's discriminatory implementation of its referral system arrangement with Respondent Employers from July 25, 1977, to October 21, 1977. Backpay shall be computed in the manner set forth above. Further, in conjunction with Respondent Employers, with Respondent Union primarily liable, make whole the above-named employees by making contributions on their behalf to the Union's health and welfare and pension funds.[17]

(e) Make whole John Kuebler, Charles Curd, Ted Katsaros, and Lawrence Kudla for any loss of pay and other benefits they may have suffered due to the false and fraudulent intraunion charges brought against them by expelling or suspending them from membership in the Union. Backpay with interest shall be computed in the manner set forth above. Further, make whole the above-

named employees by making contributions on their behalf to the Union's health and welfare and pension funds.[18]

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all seniority lists, attendance records, or records showing starting times, job assignments and hours worked, and all other records necessary for the determination of the amount of backpay due under the terms of this Order.

(g) Post at its business offices, union halls, meeting halls, all barns of employers with whom it has collective bargaining agreements, and any other places where it customarily posts notices to members, copies of the attached notice marked "Appendix B."[19] Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by an authorized

representative of Respondent Union shall be posted by Respondent Union immediately upon receipt thereof in the manner provided above. Notices are to be posted for 60 consecutive days, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that the notices are not altered, defaced, or covered by any other material.

(h) Forward signed copies of said notice to the Regional Director for posting by Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc., they being willing, at all locations where notices to employees are customarily posted.

(i) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply

herewith.

Dated, Washington, D.C. August 15, 1980

Howard Jenkins, Jr., Member

John A. Panello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT accept and condone an arrangement with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, for referral of employees that unlawfully discriminates against such employees because they exercise their Section 7 rights.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of any rights guaranteed them by the National Labor Relations Act.

WE WILL, in conjunction with the Union, with the Union primarily liable, make whole John Kuebler and Charles Curd for any loss of wages or other benefits they may have suffered because

of the discriminatory implementation of our arrangement with the Union, with interest.

FRANK MASCALI CONSTRUCTION G.C.P.CO,;
FRANK MASCALI CONSTRUCTION CO.,INC.

(Employer)

Dated____ By_____
(Representative) (Title)

Dated____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11241, Telephone 212-330-7709.

APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT threaten, coerce, or restrain union members because they exercise their Section 7 rights.

WE WILL NOT maintain seniority lists or attendance records in a false or fraudulent manner, or in such a manner as to discriminate unlawfully and retaliate against union members.

WE WILL NOT cause or attempt to cause the discharge of employee members by Willets Point Contracting Corp. in retaliation for exercising their Section 7 rights.

We will not refuse to process grievances filed by union members because they filed charges with the National Labor Relations Board.

WE WILL NOT implement our arran-

gement with Frank Mascali Construction Co., Inc., and Frank Mascali Construction G.C.P. Co., in a discriminatory manner.

WE WILL NOT fail and refuse to refer union members to work assingments in retaliation for exercising their Section 7 rights.

WE WILL NOT bring false or fraudulent intraunion charges against our members and expel or suspend them from union membership based thereon.

WE WILL NOT in any manner restrain or coerce our members in the exercise of any rights guaranteed them by the National Labor Relations Act.

WE WILL correct the seniority lists and attendance records at Willets Point Contracting Corp.

WE WILL request Willets Point Contracting Corp. to reinstate John Kuebler and Charles Curd.

WE WILL make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered by reason of our discriminatory actions in causing their discharge from Willets Point Contracting Corp. and by reason of our discriminatory failure and refusal to refer them to work assignments, with interest.

WE WILL, in conjunction with Frank Mascali Construction G.C.P. Co. and Frank Mascali Construction Co., Inc., with ourselves primarily liable, make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered because of our discriminatory implementation of our arrangement with these employers, with interest.

WE WILL make whole John Kuebler, Charles Curd, Ted Katsaros, and Lawrence Kudla for any loss of pay and other

benefits they may have suffered because of the false and fraudulent intraunion charges brought against them and their expulsion or suspension from membership based thereon.

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

_____
(Labor Organization)

Dated_____ By_____
(President)

Dated_____ By_____
(Secretary-Treasurer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York, 11241, Telephone 212-330-7709.

FOOTNOTES

[1]. The General Counsel also filed a motion to strike Respondent Union's Exh. A and all references thereto in its brief. Subsequently, Respondent Union filed a motion to reopen the hearing to introduce an additional exhibit, and the General Counsel filed an opposition thereto. The evidence which Respondent Union attached as Exh. A to its brief and seeks to have admitted into the record purportedly shows that its shop steward, Worhacz, testified truthfully at the hearing with respect to certain referrals made on August 29, 1977. Based on this additional evidence, Respondent Union argues that the Administrative Law Judge erred in discrediting Worhacz. However, the proffered evidence was available at the time of the hearing and could have been offered then. Additionally, it is well established that the Board will not reopen a record to admit evidence which merely attacks credibility. Kenai Air Service Inc., d/b/a Kenai Helicopters, 235 NLRB 931 (1978). For these reasons, we hereby deny Respondent's motion. In view of this resolution, we find it unnecessary to pass upon the General Counsel's motion to strike.

[2]. Respondent Employers and Respondent Union have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry

Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In discrediting Worhacz' testimony that he changed the August 29, 1977, starting time for three employees on August 26, the Administrative Law Judge stated that although Worhacz testified that he changed the time on the shape sheet in response to a phone call from Respondent Employers' job superintendent Paternostro, the shape sheet showed no sign of an erasure. However, Worhacz testified that he has not yet prepared the shape sheet when Paternostro called. In view of the other reasons stated by the Administrative Law Judge for discrediting Worhacz, with which we agree, we find no basis for disturbing his credibility finding.

In describing the involvement of discriminatee Katsaros with the union dissident group (FORE), the Administrative Law Judge stated that early in 1978 Katsaros appeared on a local television show airing the differences between FORE and the incumbent officials of Respondent Union. Respondent Employers contend that there is no record evidence of this appearance. They assert that the only television appearance involving Katsaros of which they are aware was a segment of the nationwide show "60 Minutes," which was broadcast on December 4, 1978, more than 2 months after the close of the hearing in this case. They therefore contend that the Administrative Law Judge must have viewed this program and suggest that as a result he became biased against Respondent Employers and Respondent

Union. There is no record evidence supporting the finding that Katsaros appeared on any television program. However, after carefully considering the record and the Administrative Law Judge's Decision, we reject as unsupported Respondent Employers' allegations that the Administrative Law Judge was biased.

3. In adopting the Administrative Law Judge's conclusion that Respondent Union violated Sec. 8(b)(1)(A) and (2) of the Act by causing the discharges of JOhn Kuebler and Charles Curd from Willets Point Contracting Corp., we find it unnecessary to pass on his reliance on Miranda Fuel Company, Inc., 140 NLRB 181 (1962).

4. The parties stipulated that FMC and GCP constitute a single integrated business enterprise.

5. During the relevant period, Willets Point did not have sufficient work to provide its drivers with full-time employment. By arrangement with the Union, Willets Point drivers for whom Willets Point did not have work were referred to other contractors.

6. This conversation occurred as a result of problems FMC and GCP had been experiencing in meeting affirmative action requirements contained in the contract for the project.

7. Sec. 32 of the contract between the Union and Respondent Employers provides that an individual must work 30 days before gaining seniority rights. Furthermore, as noted above, there is no

evidence that GCP maintained a seniority list.

[8]. The Administrative Law Judge recognized that on September 1 Paternostro was "concerned about covering the work for the next day" and that Kuebler was hired because the Union was unable to promise him the driver he needed for the next day.

[9]. The Administrative Law Judge based his conclusion that Kuebler was hired as a permanent employee in part of his finding that Daves told Kuebler either that the job would last 4 or 5 months, or that the job would last until the end of the season. In light of Agnew's credited testimony that he never told Daves how long the driver he was seeking would work, it appears Daves in his September 1 conversation with Kuebler combined Agnew's earlier remarks in mid-August about seeking a minority driver to do fill-in work over the duration of the project with the immediate need for a driver for the next day, and as a result may have communicated to Kuebler that the job being offered ws for more than 1 day. Nonetheless, even if he did indicate that a permanent job was being offered, there is no evidence that Daves had the authority to hire Kuebler; to the contrary, the record shows that the actual hiring was done by Paternostro and Agnew, who never indicated to Kuebler that the job was for more than 1 day. Therefore, any indication Daves may have made to Kuebler regarding the length of the job cannot be attributable to Respondent Employers. Accordingly, we find Daves' statement to Kuebler does not support

the conclusion that Respondent GCP hired Kuebler as a permanent employee.

10. Accordingly, we reject the Administrative Law Judge's findings that Worhacz' statements to Paternostro on September 2 caused Paternostro to discharge Kuebler, and that sometime after their conversation Paternostro decided to terminate Kuebler.

11. The General Counsel did not allege, nor did the Administrative Law Judge find, that Respondent Union violated Sec. 8(b)(1)(A) and (2) by attempting to cause Kuebler's discharge. In any event, we conclude that the record is insufficient to establish such a violation.

12. Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in Olympic Medical Corporation, 250 NLRB No. 11 (1980).

13. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on payments which are required to be made to such funds as a result of a make-whole remedy. We therefore leave to the compliance stage the question whether Respondent Employers and/or Respondent Union must pay any additional amounts into the health and welfare and pension funds in order to satisfy our make-whole remedy. See Merryweather Optical Company, 240 NLRB No. 169 (1979).

[14]. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[15]. See fn.12, supra.

[16]. See fn. 13, supra.

[17]. See fn. 13, supra.

[18]. Ibid.

[19]. See, fn. 14, supra.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRANK MASCALI CONSTRUCTION
G.C.P. CO.; FRANK MASCALI
CONSTRUCTION CO. INC.

and Case 29-CA-5975

JOHN KUEBLER, AN INDIVIDUAL

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(FRANK MASCALI CONSTRUCTION
G.C.P. CO.; FRANK MASCALI
CONSTRUCTION CO., INC.)

and Case 29-CB-3075

JOHN KUEBLER, AN INDIVIDUAL

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(WILLETS POINT CONTRACTING
CORP.)

and Case 29-CB-3115

CHARLES CURD, AN INDIVIDUAL

and

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(ALLIED USED TRUCK
EXCHANGE, INC.)

and Case 29-CB-3235

CHARLES CURD, AN INDIVIDUAL

ORDER CONSOLIDATING CASES, COMPLAINT AND NOTICE OF HEARING

It having been charged in Case No. 29-CA-5975 by John Kuebler, herein called Kuebler, that Frank Mascali Construction G.C.P. Co., herein called Respondent Employer, and in Case No. 29-CB-3075 by Kuebler, that Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Respondent Union, and in Case No. 29-CB-31115 by Charles Curd, herein called Curd, that Respondent Union have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq. herein called the Act, the General Counsel of the National Labor Relations

Board, herein called the Board, by the undersigned Regional Director for Region 29, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDER, pursuant to Section 102.33 of the Board's Rules and Regulations - Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

1. (a) The Charge in Case No. 29-CA-5975 was filed by Kuebler on

October 14, 1977, and served by registered mail upon Respondent Employer on or about October 18, 1977.

(b) The Charge in Case No. 29-CB-3075 was filed by Kuebler on October 14, 1977, and served by registered mail upon Respondent Union on or about October 18, 1977.

(c) The Charge in Case No. 29-CB-3114 was filed by Curd on November 11, 1977, and served by registered mial upon Respondent Union on or about November 11, 1977.

2. Respondent Employer is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

3. (a) At all times material herein, Respondent Employer has maintained its principal office and place of business at 120th Street and 31st Avenue,

Flushing, in the County of Queens, City and State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of asphalt and related products, and in providing and performing of road building and related services.

(b) During the past year, which period is representative of its annual operations generally, Respondent Employer, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business, goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business in interstate commerce directly from states of the United States other than the state in which it is located.

4. Willets Point Constructing

Corp., herein called Willets Point, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

5. (a) At all times material herein, Willets Point has maintained its principal office and place of business at 127-50 Northern Boulevard, Flushing, in the County of Queens, City and State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of asphalt and related products, and in the providing and performing of road building and related services.

(b) During the past year, which period is representative of its annual operations generally, Willets Point, in the course and conduct of its business, purchased and caused to be transported and delivered to its place

of business, goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business in interstate commerce directly from states of the United States other than the state in which it is located.

6. Respondent Employer and Willets Point, and each of them, are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

7. Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

8. (a) At all times material herein since in or about January 1977, and since that date, Respondent Employer, Respondent Union and Willets Point have

maintained and implemented an informal agreement, arrangement, understanding and practice relating to the hiring of extra employees by Respondent Employer.

(b) By the informal agreement, arrangement, understanding and practice described above in sub-paragraph (a), Respondent Employer, Respondent Union and Willets Point have required, and do now require, that Respondent Employer obtain its extra employees from employees employed by Willets Point through a referral system operated solely by Respondent Union, whereby said employees of Willets Point are referred to Respondent Employer upon its request on the basis of seniority.

9. Since on or about July 25, 1977, and on various dates thereafter, Respondent Union failed and refused to refer Kuebler and Curd for employment by Respondent Employer pursuant to the

informal agreement, arrangement, understanding and practice described above in paragraph 8, notwithstanding that it referred other employees pursuant to such informal agreement, arrangement, understanding and practice with less seniority than Kuebler and Curd, because they, Kuebler and Curd engaged in activities in opposition to the leadership of Respondent Union and other concerted activities for the purpose of collective bargaining and mutual aid and protection.

10. Since on or about July 25, 1977, and on various other dates thereafter, Respondent Employer failed and refused to employ Kuebler and Curd because said employees Kuebler and Curd engaged in activities in opposition to the leadership of Respondent Union and other concerted activities for the purpose of collective bargaining and mutual aid and protection, notwithstanding that

Respondent Employer had, or upon inquiry should have had, reasonable grounds for believing the Respondent Union had maintained and implemented the informal agreement, arrangement, understanding and practice described above in paragraph 8, to deny referral of Kuebler and Curd for employment by Respondent Employer because they engaged in activities described above in paragraph 9, and further notwithstanding that it had, or upon inquiry should have had, resonably grounds for believing that it was employing employees pursuant to said agreement, arrangement, practice and understanding, who had less seniority than Kuebler and Curd.

11. (a) On or about September 6, 1977, Respondent Employer discharged its employee Kuebler.

(b) Since the date of the discharge of Kuebler described above in subparagraph (a), Respondent Employer

has failed and refused to reinstate, or offer to reinstate, Kuebler to his former or substantially equivalent position of employment.

12. Respondent Employer discharged, and thereafter failed and refused to reinstate, its employee, Kuebler, as described above in paragraph 11, because said employee Kuebler engaged in activities in opposition to the leadership of Respondent Union and other concerted activities for the purpose of collective bargaining and mutual aid and protection.

13. (a) Since on or about November 11, 1977, and continuously to date, Respondent Union has failed and refused to process the grievances of Kuebler and Curd concerning their discharge by Willets Point.

(b) Respondent Union has failed and refused to process the griev-

ances of Kuebler and Curd as described above in subparagraph (a) because Kuebler and Curd engaged in activities in opposition to the leadership of Respondent Union and in other concerted activities for the purpose of collective bargaining and mutual aid and protection and they filed charges with the National Labor Relations Board in Case No.. 29-CA-6011 and 29-CA-6011-2.

14. By the acts described above in paragraphs 10, 11 and 12, and by each of said acts, Respondent Employer interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(b) and (7) of the Act.

15. By the acts described above in paragraphs 10, 11 and 12, and by each of said acts, Respondent Employer rendered, and is rendering, unlawful assistance and support to a labor organization, contributed, and is contributing, financial and other support to a labor organization, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and Section 2(6) and (7) of the Act.

16. By the acts described above in paragraphs 10, 11 and 12, and by each of said acts, Respondent Employer discriminated, and is discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, thereby encouraging membership in a labor organization, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within

the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

17. By the acts described above in paragraphs 9 and 13, and by each of said acts, Respondent Union restrained and coerced, and is restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

18. By the acts described above in paragraphs 9 and 13, and by each of said acts, Respondent Union caused, and attempted to cause, and is causing and attempting to cause, the employer to discriminate against his employees in violation of Section 8(a)(3) of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting

commerce within the meaning of Section 8(b)(2) and Section 2(6) and (7) of the Act.

19. The acts of Respondent Employer and Respondent Union described above in paragraphs 9 through 13, occurring in connection with the operations of Respondent Employer, described above in paragraphs 2, 3 and 6, have a close intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 22nd day of March 1978 at 11:00 a.m. at 16 Court Street, fourth floor, in the Borough of Brooklyn, City and State of New York, and on consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the National

Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. From NLRB-4668, Statement of Standard Procedures In Formal Hearings Held Before The National Labor Relations Board In Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the said Complaint within ten (10) days from the service thereof, and unless it does so, all the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board.

Immediately upon the filing of its answer, Respondent shall serve a copy thereof on all of the other parties.

Dated at Brooklyn, New York, this 30th day of December, 1977

(Sgd.)Samuel M. Kaynard
Regional Director,
Region 29
National Labor Relations
Board - 16 Court Street
Brooklyn, New York 11241

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRANK MASCALI CONSTRUCTION
G.C.P. CO.; FRANK MASCALI
CONSTRUCTION CO. INC.

and Case 29-CA-5975

JOHN KUEBLER, AN INDIVIDUAL

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(FRANK MASCALI CONSTRUCTION
G.C.P. CO.; FRANK MASCALI
CONSTRUCTION CO., INC.)

and Case 29-CB-3075

JOHN KUEBLER, AN INDIVIDUAL

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(WILLETS POINT CONTRACTING
CORP.)

and Case 29-CB-3115

CHARLES CURD, AN INDIVIDUAL

and

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(ALLIED USED TRUCK
EXCHANGE, INC.)

and Case 29-CB-3235

CHARLES CURD, AN INDIVIDUAL

COMPLAINT AND NOTICE OF HEARING

It having been charged in this proceeding by Charles Curd, herein called Curd, that Local 282, International Brotherhoood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Respondent Union, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for Region 29, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges

as follows:

1. The Charge in this proceeding was filed by Curd on Marcuh 7, 1978, and served by registered mail upon Respondent Union on or about March 7, 1978.

2. At all times material herein, Allied Used Truck Exchange, herein called Allied has maintained its principal office and place of business at 127-16 34th Avenue, Corona, in the County of Queens, City and State of New York, herein called the Corona Barn where it is, and has been at all times material herein, engaged in the wholesale and retail sale of used trucks and related products.

3. During the past year, which period is representative of its annual operations generally, Allied, in the course and conduct of its business, sold and distributed at its Corona Barn, trucks valued in excess of $500,000, of which

trucks valued in excess of $50,000 were shipped from said Corona Barn in interstate commerce directly to states of the United States other than the state of New York.

4. Allied is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6. (a) On or about February 8, 1978, Respondent Union expelled its members, John Kuebler, Ted Katsoris and Lawrence Kudla, herein called Kuebler, Katsoris and Kudla respectively, and suspended its member, Curd, for two years.

(b) Respondent Union expelled Kuebler, Katsoris and Kudla and suspended Curd, as described above in subparagraph

(a), because they engaged in activities in opposition to the leadership of Respondent Union and in other concerted activities for the purpose of collective bargaining and mutual aid and protection and they filed charges with the National Labor Relations Board and gave testimony under the Act.

7. By the acts described above in paragraph 6, and by each of said acts, Respondent Union restrained and coerced, and is restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

8. The acts of Respondent Union described above in paragraph 6, occurring in connection with the operations of Allied, described above in paragraphs

2 through 4, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 15th day of May, 1978, at 10:00 A.M. at 16 Court Street, fourth floor, in the Borough of Brooklyn, City and State of New York, and on consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures In Formal Hearings Held Before the National Labor Relations Board In Unfair Labor

Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so, all the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Brooklyn, New York this 19th day of April, 1978.

(Sgd.)SAMUEL M. KAYNARD
Regional Director,
Region 29
National Labor Relations
Board - 16 Court Street

Brooklyn, New York 11241

Oct. 21, 1977

Mr. John Kuebler
223 Sullivan Ave.
Farmingdale, N.Y., 11735

Dear Mr. Kuebler:

A review of the Company records indicates that you have worked only three days in the past five months. These absences were caused in large measure by your failure to physically shape your job each day.

You are reminded that all employees are required to physically shape their jobs each day. Your omissions necessitate our terminating your employment with us as of this date.

Very truly yours,

WILLETS POINT CONTRACTING CORP.

(Sgd.) Paul Tully
Superintendent Maintenance Div.

APPENDIX B

National Labor Relations Act, 29 U.S.C. Sections 158(a)(1)(2)(3), 158(b)(1)(A), (2), (3) and 160(f):

158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assited by any action defined in this section as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when

made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly

required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents -

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;...

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation

fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

160. Prevention of unfair labor practices - Powers of Board generally

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the

Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record

considered as a whole shall in like manner be conclusive.

ADMINISTRATIVE PROCEDURE

5 U. S. C. Section 554

554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceeding in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency

is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of -

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their

representatives.

(c) The agency shall give all interested parties opportunity for -

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the receiption of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte

matters as authorized by law, such an employee may not -

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply -

(A) in determining applications

for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

National Labor Relations Board's

Rules and Regulations

Section 102.15

Complaint

Sec. 102.15 When and by whom issued; contents; service. - After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts

which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

Office - Supreme Court, U.S.
FILED
SEP 20 1982
CLERK

No. 82-84

In the Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

Cases:	Page
Garment Workers v. *Quality Manufacturing Co.*, 420 U.S. 276	7
Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274	5
NLRB v. *Eldorado Manufacturing Corp.*, 660 F.2d 1207	6
NLRB v. *Solboro Knitting Mills, Inc.*, 572 F.2d 936, cert. denied, 439 U.S. 864	7
Radio Officers' Union v. *NLRB*, 347 U.S. 17	4, 5
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	7
Woelke & Romero Framing, Inc. v. *NLRB*, No. 80-1789 (May 24, 1982)	7
Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, enf'd, 662 F.2d 899, cert. denied, No. 81-987 (Mar. 1, 1982)	5, 6

Statute:	
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
Section 8(a)(1), 29 U.S.C. 158(a)(1)	2
Section 8(a)(3), 29 U.S.C. 158(a)(3)	3, 4, 5, 6
Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	1, 2
Section 8(b)(2), 29 U.S.C. 158(b)(2)	2, 5
Section 10(e), 29 U.S.C. 160(e)	7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-94

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The Board found that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by threatening members Kuebler and Curd with loss of employment because they had exercised their rights under the Act, and by refusing to process their grievances because they had filed unfair labor practice charges under the Act. It further found that the Union violated Sec-

tion 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by falsifying Kuebler's and Curd's employment records, refusing to refer them for employment, and ultimately causing them to be discharged because they had exercised their rights under the Act. The Board also found that the Union violated Section 8(b)(1)(A) and (2) of the Act by filing false intraunion charges against members Curd, Kuebler, Katsaros and Kudla, and by suspending Curd and expelling Kuebler, Katsaros, and Kudla from union membership because they had exercised their rights under the Act.[1] The petition contests only the Board's finding that the Union was responsible for Curd's and Kuebler's discharges.

1. Willets Point Contracting Corporation ("Willets"), an asphalt supply and paving company in New York City, operates under a collective bargaining agreement with the Union covering its drivers (Pet. App. 16a-18a). Willets assigns work to its drivers under a set of rules and practices that is known as the "shape" system and is based primarily on seniority (*id.* at 19a-20a). Under the shape system in effect at Willets during the relevant time, drivers were required to appear at the "shape trailer" for job assignments at least once a week (*id.* at 27a). The shape system at Willets was run exclusively by Union steward Worhacz (*id.* at 68a-69a).

Charles Curd and John Kuebler, long-time Willets drivers, were discharged by Willets in October 1977

---

[1] In addition, the Board found that the Frank Mascali Construction Co. and Frank Mascali Construction G.C.P. Co. violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by accepting and condoning a referral arrangement with the Union that discriminated against Kuebler and Curd because they had exercised their rights under the Act (Pet. App. 3a).

because Willets believed they had not fulfilled their obligations under the shape system (Pet. App. 102a-103a). In fact, the two employees had fulfilled their obligations, but Union steward Worhacz had falsified the number and frequency of their shapes because of his hostility to their dissident union activity (*id.* at 71a-73a). Indeed, when Willets' job superintendent remarked to Worhacz that the records reflected that Curd and Kuebler were not shaping frequently enough, Worhacz did not disagree (*id.* at 104a).

In finding that the Union violated the Act by causing the discharge of the two employees, the administrative law judge (ALJ), whose decision was upheld by the Board, explained (Pet. App. 107-108) that

> the one day a week shape was still in effect in October; Kuebler and Curd had satisfied their obligations to shape once a week through October 21; the employer Willets Point had delegated total responsibility for the maintenance of shape records to the Union's shop steward; and those records, through deliberate falsification and manipulation, showed that Kuebler and Curd had not shaped. Thus I find and conclude that the discharges of Kuebler and Curd were caused by the Union as a further manifestation of the discriminatory scheme devised and implemented by Worhacz in retaliation to [*sic*] the protected concerted activity of Kuebler and Curd in violation of Section 8(b)(1)(A) and (2) of the Act.

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-6a). The court stated (*id.* at 4a-5a):

> The Union vigorously contests the findings of violations, but most of its contentions challenge

the credibility determinations made by the ALJ and accepted by the Board. We see no basis to disturb them. We also find the record sufficient to support the Board's finding that Worhacz was acting as the agent of the Union. *See NLRB v. Local 3 IBEW*, 467 F.2d 1158 (2d Cir. 1972). We need not determine whether the Board's current test for determining causation when action is taken because of dual motivation, *see NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3693 (Mar. 2, 1982), is applicable to a Board decision rendered prior to *Wright Line*, because in this proceeding the Union's essential position was denial of a wrongful motivation, not that a wrongful motivation played only a minor part in an otherwise justified action.

2. The Union does not contest the Board's finding, upheld by the court of appeals, that Union steward Worhacz deliberately falsified the shape records and misled Willets in order to retaliate against Curd and Kuebler for engaging in dissident union activities. Rather, the Union contends (Pet. 8-11) that the Board improperly dismissed an unfair labor practice charge against Willets, thereby precluding a finding of whether Willets would have discharged Curd and Kuebler for reasons other than their supposed failure to meet their shape obligations, a finding that the Union contends is necessary before it can be held responsible for the discharges. There is no merit to this contention.

The Union concedes (Pet. 8) that this Court held in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 53-54 (1954), that a finding of a violation of Section 8(a)(3) by an employer is not a prerequisite to a

finding of a violation of Section 8(b)(2) by a union. In that case, the Court concluded (347 U.S. at 53; footnote omitted) that a finding of a violation of Section 8(b)(2) "requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8(a)(3)."[2]

As the court of appeals correctly noted (see page 4, *supra*), the Union's reliance on the Board's *Wright Line* test (Pet. 9-13) is misplaced. In *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982), the Board applied to the Section 8(a)(3) context the test established in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), for determining whether a school board's discharge of a nontenured teacher violated the Constitution where the discharge was based in part on the employee's constitutionally protected activities.[3] The Board thus held (251 N.L.R.B.

---

[2] In *Radio Officers*, as here, the Section 8(b)(2) violation was based on findings that the employer had denied a union member employment at the instigation of the union, and that the union's purpose in causing the unfavorable treatment was to coerce compliance with union rules or practices. 347 U.S. at 28-33.

[3] The Court enunciated the following rule in *Mt. Healthy, supra*, 429 U.S. at 287 (footnote omitted):

> Initially, * * * the burden was properly placed upon [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. [The teacher] having carried that burden, however, the District Court should have gone on to determine whether

at 1089) that in a Section 8(a)(3) discharge case its General Counsel is required to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," after which the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Here, however, the issue is not the employer's motive in discharging the employees, and the union is not contesting the finding that it was motivated by unlawful considerations. Moreover, the Union did not contend that Curd and Kuebler were discharged for any reason other than their supposed failure to meet the shape obligations. In any event, even if there were such evidence, the failure of the Board to issue a complaint against Willets would not have precluded the Union from raising it.[4]

Thus, the only issue actually presented by petitioner is whether the Board's findings, upheld by the court of appeals, are supported by substantial evidence. That evidentiary issue does not warrant re-

---

the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

[4] *NLRB* v. *Eldorado Manufacturing Corp.*, 660 F.2d 1207 (7th Cir. 1981) (Pet. 12-13), does not support petitioner's contention. The *Wright Line* analysis was employed there to determine the motivation for the Union's seeking the employees' discharge, not the reasons why the employer in fact discharged them. Moreover, in that case there was a question of mixed motivation—whether the employees had been discharged because of their engaging in protected intraunion activities or because of their gross misconduct.

view by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

SEPTEMBER 1982

---

[5] The Union also contends (Pet. 13-20) (1) that the Board erroneously concluded that Worhacz was its agent and (2) that the finding that the Union violated the Act by causing Willets to discharge Kuebler and Curd cannot be upheld because that theory was not pleaded in the General Counsel's complaint. The Union did not raise these arguments before the Board. Accordingly, under Section 10(e) of the Act, 29 U.S.C. 160(e), the Union is precluded from raising them here. *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20; *Garment Workers* v. *Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975). In any event, there is no merit to these contentions. First, the court of appeals found that the finding of Worhacz' agency status was supported by the evidence (Pet. App. 4a-5a). Second, the Board is not prohibited from finding related violations not alleged in the complaint as long as the parties understood the issues and had full opportunity to present their case on those issues. *NLRB* v. *Solboro Knitting Mills, Inc.*, 572 F.2d 936, 944 (2d Cir.), cert. denied, 439 U.S. 864 (1978). During the hearing before the administrative law judge, the parties litigated Worhacz' control of the shape records, the veracity of those records, Willets' reliance on Worhacz' records in discharging Kuebler and Curd, and Worhacz' knowledge of Willets' reliance. In addition, Worhacz' shape records themselves were introduced into evidence at the hearing. The Union thus was afforded due process.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 567051 1112

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-94

IN THE

Supreme Court of the United States

October Term, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF LOCAL 282, I.B.T.

J. WARREN MANGAN

O'Connor & Mangan, P.C.
29-27 41st Avenue
Long Island City, N.Y.
11101
(212) 361-7950

Counsel for Petitioner

(12545)

TABLE OF CONTENTS

		Page
POINT I:	THE BOARD FOUND THAT LOCAL 282'S SHOP STEWARD, ROBERT WORHACZ:	1
POINT II:	THE BOARD ARGUES THAT THIS IS NOT A MOTIVE CASE AND THAT WILLETS' MOTIVE IN DISCHARGING THE FIVE(5) UNIT EMPLOYEES IS NOT AN ISSUE HEREIN	3
POINT III:	THE BOARD ARGUES THAT LOCAL 282 DID NOT ARGUE BEFORE IT THAT WORHACZ WAS NOT ITS AGENT	6
Conclusion		10
Supplemental Appendix		A-1

TABLE OF CASES

Page

Local 357 I.B.T. v. NLRB..... 5
365 U.S. 667, 675 (1961)

Mt. Healthy City Board
of Education v. Doyle..... 3,4,9
429 U.S. 274 (1977)

NLRB v. Salboro Knitting
Mills, Inc..... 7
572 F. 2d 936, 944 (2d Cir.)
cert. denied, 439 U.S. 864
(1978)

No. 82-94
IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF LOCAL 282, I.B.T.

I. The Board found that Local 282's shop steward, Robert Worhacz:

1. falsified shape records, thereby causing the discharge of Kuebler and Curd (App. A at 68-69, 71-72, 164),

2. failed and refused to refer Kuebler and Curd to work assignments (App. A at 69-70, 84-89, 90-91, 102, 163-165),

3. threatened Kuebler and Curd (App. A 72-73, 91-92, 102, 163), and

4. filed false intraunion charges

against Kuebler, Curd and two others (App. A 145-147, 166-167).

The core feature of those findings and the decisions below is that Worhacz's conduct is attributable per se to Local 282 because he was the unit employees shop steward. The agency issue presented by this petition remains the same whether it be addressed directly to causation for Kuebler and Curd's discharge, the falsification of shape records, refusing to refer them to work assignments, threatening them or filing intraunion charges against them. This petition contests the Board's application of the respondeat superior principle to the facts herein.

On October 21, 1977 Willets sent the same discharge letter to five (5) bargaining unit employees, including Kuebler and Curd. The proximate cause for all their discharges was the failure to shape the Willets' job daily (App.

C at 1). Worhacz's first notice of these letters, and the discharges resulting therefrom, came from Kuebler on October 24. Worhacz questioned the sender and was told that Willets was operating ten (10) trucks and was cutting its seniority list to ten (10) drivers.

The Board argues that Willets' shape records were misleading and caused the Kuebler and Curd terminations. The argument is specious. Shape records could not have misled Willets. Kuebler and Curd, admittedly, did not shape daily and the ALJ found that the failure to do so subjected them to removal from the seniority list (App. A at 22).

II. The Board argues that this is not a motive case and that Willets' motive in discharging the five (5) unit employees is not an issue herein. The Board has, thus, misread the decision of this Court in Mt. Healthy City Board

of Education v. Doyle, 429 U.S. 274 (1977). For purposes of a Section 8(b)(2) violation two elements are required. "First," the union's conduct must have caused the discharges. "Second", the employer's participation would have to be a violation of Section 8(a)(3). If either, or both, of these elements is not proven by General Counsel there cannot be a violation of Section 8(b)(2). Since the Board has concluded that Local 282 attempted to cause the discharges of Kuebler and Curd, the Board's 8(b)(2) finding must also be supported by record evidence sufficient to prove, by a preponderance of the evidence, that Willets' would not have discharged Kuebler and Curd "but for" their protected activity.

The Mt. Healthy "causation test" is applicable herein despite the General Counsel's dismissal of the charge against Willets. The test is whether Kuebler

and Curd would have been discharged by Willets "but for" their union activity. This Court has said "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" whether the statute has been violated. Local 357 I.B.T. v. NLRB, 365 U.S. 667, 675 (1961). Unit employees are not entitled to immunity from termination merely because of their union activism. Clearly, the Board should not have found a violation of Section 8(b)(2) without a showing, by a preponderance of the evidence, that Willets would not have terminated Kuebler and Curd "but for" their protected union activity. No violation exists if Willets would have made the same decision to discharge them despite any causation conduct attributed to Local 282. The evidence is that Willets reduced its seniority list to the number

of trucks that it was operating and removed from its list that group of five (5) drivers that were not shaping daily.

III. The Board argues that Local 282 did not argue before it that Worhacz was not its agent. Again, the Board is in error. This same argument was raised by the Board before the court below. Local 282 brought to that panel's attention its exceptions to the ALJ's Decision. [App. C at 2-6]. Local 282 stated to the Board that Worhacz was not within the scope of his authority, as shop steward, when engaged in the unlawful conduct attributed to him.

Local 282 did not consent to a trial of the unlawful discharge issue. General Counsel only sought to prove that Kuebler and Curd's grievance was not processed through the arbitration procedure because they had filed an unfair labor practice charge with the

Board. General Counsel did not plead, prove or brief unlawful discharge and Local 282 was, therefore, not accorded the due process required by the Administrative Procedure Act, 5 U.S.C. 554 and the Board's Rules and Regulations, 29 C.F.R. Section 102.15 on that subject.

Although the court in NLRB v. Solboro Knitting Mills, Inc., 572 F. 2d 936, 944 (2d Cir.), cert. denied, 439 U.S. 864 (1978) was not overly concerned with the General Counsel's failure to allege, argue, and brief an 8(a)(5) finding by the Board, it reasoned that the Board's bargaining order remedy would have remained the same with or without the finding of a Section 8(a)(5) violation. Here, on the contrary, the Board's Order requires affirmative action by Local 282. This includes, but is not limited to, compensating Kuebler and Curd for all days:

1. between July 25 and October 21, 1977, on which their seniority would have entitled them to be assigned to work, whether or not they shaped or shaped late on those days, with interest (emphasis added).

2. they would have worked for Willets between October 21, 1977 and the date of their reinstatement or until such time as they have found substantially equivalent positions elsewhere if Willets refuses to reinstate them. 1/

1/ Local 282, in accordance with the Board's Order, requested Willets to immediately and fully reinstate Kuebler and Curd to their former jobs. Willets refused and Local 282 moved to compel arbitration of this reinstatement dispute, in accordance with the arbitration provision of their labor agreement. Willets opposed Local 282's motion, and also, petitioned the Board for a modification of its Decision and Order to prevent Local 282 from bringing this dispute to arbitration, because Local 282 would thereby be "attempting to avoid the liability imposed on it by the Board." On November 5, 1981, the Board denied Willets' motion "as lacking in merit" [App. C at 7 - 10]. However, on January 19, 1982, Local 282's motion to compel arbitration, was denied by the Hon. John S. Lockman of the Supreme Court of the State of New York, County of Nassau. That Order is on appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department.

The Board's assessment of liability against Local 282 is punitive rather than compensatory. The relevant inquiry is whether protected activity was a "motivating factor" in Willets' decision to terminate Kuebler and Curd. Enforcement of the Board's Order without evidence of protected conduct being a "motivating factor" in Willets' decision to discharge Kuebler and Curd would place them in a better position by having engaged in protected activity than had they not. This would be contrary to this Court's rule of causation enunciated in its Mt. Healthy test.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Warren Mangan
(Counsel of Record)
O'CONNOR & MANGAN, P.C.
29-27 41st Avenue
Long Island City, N.Y.
(212) 361-7950

Attorneys for Petitioner

October 8, 1982

Oct. 21, 1977

Mr. John Kuebler
223 Sullivan Ave.
Farmingdale, N.Y., 11735

Dear Mr. Kuebler:

A review of the Company records indicates that you have worked only three days in the past five months. These absences were caused in large measure by your failure to physically shape your job each day.

You are reminded that all employees are required to physically shape their jobs each day. Your omissions necessitate our terminating your employment with us as of this date.

Very truly yours,

WILLETS POINT CONTRACTING CORP.

Paul Tully
Superintendent
Maintenance Div.

PT:pb

cc: M. Carbone-Local 282

March 11, 1982

Hon. Justices Cardamone,Timbers & Newman
c/o A. Daniel Fusaro, Clerk
U. S. Court of Appeals
Second Circuit, U. S. Courthouse
Foley Square, New York 10007

Re: NLRB v. Local 282 I.B.T.
and Frank Mascali Construction et al
Docket No. 81-4166

Dear Judge Cardamone:

At oral argument of this appeal Judge Cardamone asked the undersigned whether Local 282 had ever raised its contention that Robert Worhacz was not an agent of the Union when he was engaged in recordkeeping for Willets Point Contracting Cop., before the Board. My initial response was in the negative and corrected thereafter. Unfortunately, I failed to respond to the Board's argument that the "Union never raised this contention before the Board" in Local 282's reply brief.*

In order to satisfy any doubt on this subject I have incorporated within this letter those portions of Local 282's Exceptions to the Administrative Law Judge's decision and supporting Brief which refer to this subject.**

*See pages 47-48

**I have chosen this method as opposed to a submission of the Exceptions because they are on 8½ by 14 stationary.

I. EXCEPTIONS:

"25. [J.D. 24, lines 21-34]. The ALJ erred in concluding that Worhacz, exclusively, took over the Willets Point recordkeeping function after Richard Moore's employment terminated. The record evidence is that his work was done jointly by the person dispatching the drivers and Worhacz. After Moore's departure the dispatching was handled by Paul Tully and then Frank Daley. There is no basis at all for the ALJ's conclusion that Willets Point "delegated the power to... make assignments of work to the Union shaop steward on the job." Assuming, arguendo, that such an assignment was made to Worhacz, there is no basis for the ALJ's conclusion that Worhacz was acting within the scope of his authority, as Local 282's shop steward, while performing these functions.

28. [J.D. 25, lines 20-23 and J.D. 26, lines 1-7]. The ALJ erred in crediting Kubler and Curd's account of what they allege occurred on July 18, 1977 and not crediting Worhacz's denial. Furthermore, assuming that Worhacz made the statement attributed to him, there is no basis for concluding that he conduct came within the scope of his authority as shop steward."

II. BRIEF:

Page 53, Paragraph 2 reads as follows:

"The ALJ found that Willets 'delegated total responsibility for the maintenance of shape records to [Worhacz].' These records were maintained by Moore,

alone, prior to 1976 and thereafter by Worhacz and the Willets' dispatcher, jointly. Whether these records were 100% accurate or not cannot be either credited to or be the cause for any censure of Local 282. Any participation of Worhacz in the preparation or maintenance of these records was not at the behest of Local 282 and, while engaged in this work, he was not acting as a representative of Local 282."

I hope that the foregoing resolves the issue raised by the Board in its Brief.

Very truly yours,

J. Warren Mangan

JWM:av
cc: Sandra Elligers, attorney
National Labor Relations Board

Howard Mattson, Esq.
General Contractors Association

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRANK MASCALI CONSTRUCTION
G.C.P. CO.: FRANK MASCALI
CONSTRUCTION CO., INC.

and Case 29-CA-5975

JOHN KUEBLER, an Individual

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(Frank Mascali Construction
G.C.P. Co.; Frank Mascali
Construction Co., Inc.)

and Case 29-CB-3075

JOHN KUEBLER, an Individual

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(Willets Point Contracting
Corp.)

and Case 29-CB-3115

CHARLES CURD, an Individual

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(Allied Used Truck
Exchange, Inc.)

and Case 29-CB-3235

CHARLES CURD, an Individual

ORDER DENYING MOTION

On August 15, 1980, the National Labor Relations Board issued a Decision and Order[1/] in the above-entitled proceeding, finding that Respondent Employers and Respondent Union had engaged in and were engaging in unfair labor practices within the meaning of Section 8(a)(1)and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, and ordering that they cease and desist therefrom and take certain affirmative action.

Thereafter, on September 2, 1981, Party-in-Interest Willets Point Contracting Corp. filed a Motion to Reconsider submitting, inter alia, that the Board's Decision and Order imposed liability on Respondent Union for backpay due the

---

1/ 251 NLRB 219 (1980).

Charing Parties, that Respondent Union has filed an action in the Supreme Court of the State of New York which seeks to compel Willets Point to arbitrate whether it wrongfully discharged the Charging Parties and is liable to them for backpay, and that Respondent Union is thereby attempting to shift its liability to Willets Point. It therefore moves the Board to modify its Decision and Order to prevent Respondent Union from attempting to avoid the liability imposed on it by the Board. On September 15, 1981, counsel for the General Counsel filed a response to the motion to reconsider.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that Willets Point Contracting Corp.'s Motion to Reconsider be, and it hereby is, denied as lacking in merit.

Dated, Washington, D. C., November 5,1981.

By direction of the Board:

Enid W. Weber
Associate Executive Secy.

END OF DOCKET